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Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

Andrew Chien
Petitioner,
v.
Skystar Bio Pharmaceutical Company,
Scott Cramer, Steve Lowe, David Wassung,
Weibing Lu
Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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January 20, 2011

QUESTIONS PRESENTED

1. Are the followings still the accepted and usual course of judicial proceedings?

(1) recognizing a registered corporation agent's representative in receiving the Complaints for a corporation major officer who named as a Defendant and living in a foreign country.

(2) not to put "leave for amend" in a final order.

(3) drawing all reasonable inferences in favor of the non-moving party in dismiss under FRCP 12(b)(6)

(4) to make ruling in sanction only after receiving defendant's response to plaintiff 's allegation in normal court procedure.

2. Can Andrew Chien take direction action against Defendants who through fabricated unpaid compensation story, wrongly appropriated his shares in a dissolved corporation after the reverse merger?

PARTIES TO THE PROCEEDING

Andrew Chien	Petitioner
Skystar Bio Pharmaceutical Company,	Respondent
Scott Cramer,	Respondent
Steve Lowe,	Respondent
David Wassung,	Respondent
Weibing Lu.	Respondent

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PETITION FOR A WRIT OF CERTIORARI

Andrew Chien respectfully petition for a writ of certiorari to review the judgment of Appeals Second Circuit, in so far as it found the District Court of Connecticut had no error in grant Defendants "Motions for Dismiss" based on FRCP 12(b) and "Motion for Sanctions" in Plaintiff's two actions.

OPINIONS BELOW

The Second Circuit's rejection of the petition of Andrew Chien for rehearing en banc on October 25, 2010, is not officially reported, and a copy is annexed as Appendix App. 1.

The Second Circuit's Summer Order on May 26, 2010, is not officially reported, and a copy is annexed as Appendix App. 2-5.

The Ruling and Order, dated June 8, 2009, of the United States District Court for Connecticut for Second Action initiated by Andrew Chien is published on 623 F. Supp. 2d 255, a copy is annexed as Appendix App. 6-30.

The Ruling and Order, dated August 12, 2009, of the United States District Court for Connecticut for the sanction against Andrew Chien in the Second Action, is not officially reported, and a copy is annexed as Appendix App.31-40.

The Ruling and Order, dated July 17, 2008, of the United States District Court for Connecticut for First Action initiated by Andrew Chien and its former counsel is published on 566 F. Supp. 2d 108, a copy is annexed as Appendix App. 41-64

The Ruling and Order, dated February 5, 2009, of the United States District Court for Connecticut for the sanction against Andrew Chien and its former counsel of the First Action, is not officially reported, and a copy is annexed as Appendix App. 65-91.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relative FRCP rules and Exchange Act and State rules will be provided in Appendix App. 92-98.

STATEMENT OF THE CASE

1. Brief Introduction of This Case

The basic story initiated from that in the fourth quarter of 2005, a shell company of Cyber Group Network Corporation ("CGPN") did a reverse merger with Skystar, to distribute a fixed number of 1,260,651 shares of Skystar among existing shareholders of CGPN on a pro rata basis. When the news announced in September 21, 2005, and 8-K reported on September 26, 2006, all SEC filings showed CGPN only had about 177 million shares issues and outstanding that means about 140 share of CGPN could exchange one share of Skystar. Andrew Chien began to purchase the shared of CGPN from September 21, 2005 until November 4, 2005 for aggregated above/around 6.2 million shares. At the time of merger closing, Defendants Cramer, Lowe and Wassung, approved by Weibing Lu, abruptly issued about 323 millions of new shares to themselves, in the excuse to offset their unpaid compensation about $0.9 million which is fabricated, and made CGPN had total 500 million shares outstanding that means about 397 share of CGPN exchanged one share of Skystar.

Mr. Chien has two areas of allegations against Defendants:

One is "tort", "civil theft" and "conspiracy", "unjust enrichment", for his stolen shares. After CGPN's wrongly issuance of new 323 millions shares on November 7, 2005, the total shares of Skystar distributing to Defendants Cramer, Lowe and Wassung, increased to 917,513 (72%) from 292,344 (23%) shares while Andrew Chien's distribution reduced to 15,726 from deserved 44,384 shares, and Andrew Chien lost 28,658 shares with market value of $159,338, calculating on the share closing price of November 7, 2005. Beyond that, due to General Accepted Accounting Principles ("GAAP"), the issuance of 323 million shares should value at $4.5 million far more than Defendants claimed fabricated unpaid compensation $0.9 million. The unjust enrichment of defendants Cramer, Lowe and Wassung is directly at Mr. Chien's and other CGPN shareholders' expenses.

Another allegation is securities fraud because Mr. Chine share purchasing price is about $5.11 per share (after 1 for 397 reverse split adjustment in

February 16, 2006) and sold them on July 2008 for $1 per share (Skystar made additional 1 for 10 stock reverse split on May 18, 2009, then got over $20 million financing, and made 2 for 1 split on November 17, 2009, and these splits haven't adjusted price in this document) after he was aware Defendants unpaid compensation was fabricated.

Mr. Chien commenced lawsuits against Defendants twice. First Action was through his former counsel on May 17, 2007 in the District Court of Connecticut. Second Action was at the end of 2008 in the Connecticut Superior Court as pro se, which was also transferred to the District Court of Connecticut. Both Actions were denied and Mr. Chien got sanctions twice.

Mr. Chien filed appeals for all two actions and two sanctions and made four appeal cases consolidated. Appeals Second Circuit made Summer Order on May 26, 2010. Although the Summer Order, in "CLUSION" (App. 5), wrote: "we have considered each of defendant's argument of appeal and find them to be without merit", the Appeals Second Circuit affirms "the judgment of the district court", and its " dismissal of plaintiff's complaint was free of error ...". It is hardly to understand that how could Second Circuit, based on defendants being without merit, confirms that District Court are no errors in its granting Defendants' "Motion of Dismiss " and "Motion for Sanction" against plaintiff twice.

On June 8, 2010, Andrew Chien filed "Petition for Rehearing En Banc", which was rejected by Appeals

Second Circuit on October 25, 2010 (Appendix App.1) without any explanation.

In the following, we will mention several district court's errors which are the errors of Appeals Second Circuit also.

2. Imperative Public Interests

There are imperative public interests in discovering the Fraud of Reverse Merger with Chinese Company:

(1). As reported by Wall Street Journals on December 20, 2010 entitled "Congress and SEC Hit Stocks Made in China": (http://online.wsj.com/article/SB10001424052748704610904576032091919244966.html)

"... The Securities and Exchange Commission has begun a crackdown on the practices of the "reverse takeover" market for Chinese listings, according to people with knowledge of the probe. Specifically, the SEC's enforcement and corporation-finance divisions have begun a wide-scale investigation into how networks of U.S. accountants, lawyers, and bankers have helped bring scores of Chinese companies onto the U.S. stock markets, these people say.

The SEC has also begun homing in on individual Chinese companies for accounting violations and lax auditing practices, these people say, beyond a number of previously announced investigations.

On Tuesday, the SEC filed a case in the area, settling a lawsuit against accounting firm Moore Stephens Wurth Frazer & Torbet LLP and one of its partners for its audits of China Energy, which was listed on Nasdaq in 2005.

Behind the scenes, the House financial-services committee is also revving into gear, and may hold hearings on Chinese-company accounting in 2011, according to a person familiar with the matter...

By this spring, some 340 Chinese companies listed on U.S. stock exchanges were using small, largely unknown auditing U.S. firms, who in turn may have been contracting the work back out to local Chinese firms, according to the SEC's chief accountant."

(2) In the article the named accounting firm which made settlement (http://www.sec.gov/litigation/admin/2010/33-9166.pdf) with SEC was Moore Stephens Wurth Frazer & Torbet LLP, which was the auditor for Skystar in fiscal year 2005, and made falsified back-dating story that the granting date of issuance of over 320 million shares to Defendants Cramer, Lowe and Wassung was September 1, 2005 .

(3) In today's market, many Chinese companies through reverse merger became US domestic companies. US investors couldn't sue major officers of the Chinese companies in normal civil procedure if every court had followed this case doing to deny the corporation agency legality of serve legal documents.

(4) In this case, Defendants declared that Mr. Cramer is the only independent Director of Skystar. Currently, Mr. Cramer's Skystar shares are worth about $3 million, a small portion of them was wrong appropriated from Mr. Chien. What Mr. Cramer did for CGPN is an example that the conspirators can make money in the reverse merger through making numerous and consistently falsified SEC reports and accounting. He exports USA conspirator's skills to China, while USA imports Chinese conspirators' results.

(5) All court documents of the two actions showed that US Court would not be serious to treat conspiracy and falsified accounting of CGPN, which told Weibing Lu and other Chinese top offers that SEC rules, ethics code for auditors and lawyers sometimes are just decorated paper. Victims like Mr. Chien got sanctions because he dared to sue the conspirators. The "evidence" of sanction Mr. Chien's made by Defendants and Court is one of his post messages for invest risk discussion, which the court wrote many pages to analyze as shown in the ruling (App.65-91). However, the court, as showed in its rulings, will not read/analyze, or just read/analyze little of Mr. Chine's allegations against conspirators, even his allegation following FRCP 9(b) standards to list defendants' thirty SEC filings and two news releases containing fraud. All these told public that the USA legal system is very weak in enforcing SEC rules and accounting standard such as GAAP for public companies.

3. Factual Background

(1). Fabricated Unpaid Compensation Before Reverse Merger

In 2000 and 2001, CGPN wanted to develop and marketing of one device called E-Snitch, which can track missing or stolen computers within five feet of their location, and another software products called PPIRT (Password Protection Information Retrieval Technology).

However, Due to the failure of product development, the Company ceased operation in 2002. In 10KSB for the period ended December 31, 2002, it reported revenue zero, inventory zero, halted operation, and sold all computers and office equipment, and cancelled rental of office, and its only assets were $800 cash.

The status of CGPN from year end 2002 to November 2005 should classify as a "shell" company because its no operation, and assets consisting solely of cash and cash equivalents following the definition described Rule 405 under the Securities Act of 1933 and Rule 12b-2 under the Securities Exchange Act of 1934. The shell company usually doesn't have full time employees, and its costs limited to the costs of keeping reporting status, such as transfer agency fee, annual auditing fee, and SEC filing costs if there is any (Skystar paid $120,000 cash to CGPN to clean the balance sheet in reverse merger of 2005).

When CGPN ceased operation, President Mr. Serrano and Director Mr. Cramer took care of the shell company. President Mr. Serrano resigned on December 31, 2004. "As a result of his resignation, the loan amount due to him of approximately $220,000 was negotiated to $45,000". The unpaid compensation of $45,000 was settled at 2 million shares of Common Stock, which is $ 0.0225/share, as 9 times high as the share price which the defendants Cramer, Lowe and Wassung settled with Skystar. Both settlements are on same day of November 7, 2005.

Mr. Cramer was not a founder of CGPN, and only owned 4% of total outstanding shares before July 30, 2004. He engaged with Lowe and Wassung together to fabricate the business activity, and falsified accountings to obtain up to 72% of the company's shares when the company was insolvent and acquired by Skystar in November 2005.

In SEC filings between 2003 to 2005, Mr. Cramer falsified following stories for CGPN: "*substantially all of its efforts have been concentrated in research and development activities", and "we are currently marketing* PPIRT to government agencies, corporations and OEM's", then to hire Mr. Lowe for *Marketing and Sales,* and also to hire Wassung without any disclosure of his background and job description.

The reality is:

None of Cramer, Lowe, and Wassung has any professional background capable of doing any computer relative hard ware and software products development, and CGPN didn't have any facilities, equipments, inventories, and financing to train Cramer, Lowe, and Wassung to develop the products.

Cramer, Lowe and Wassung were directors but *not employees*, in the definition of "employee" of IRS, because they didn't submit, directly or indirectly, regular services such as research and development of its hardware and software products, or raising capital, to CGPN.

In CGPN earlier SEC filing, it disclosed the founder and patent owner of CGPN returned all of over 5 million shares to the company after he couldn't serve the company. At least, these employees, who served CGPN in early stage before operation ceased, understood their fiduciary duty to the shareholders.

From January 2003 to September 2005, CGPN total reported to add $93,511 accrued expenses and $880,404 unpaid compensation to their balance sheet. From October 2005 to November 2005, there were additional unpaid compensation and accrued expenses added, which was not disclosed by CGPN (Skystar) yet. All these numbers were falsified.

On December 31, 2004, Cramer, Lowe and Wassung issued over 32 million of shares of market value of $192,900 to themselves, made them ownership together from 4%(June 30, 2004) up to 23%.

(2). Tout, Civil Theft, Conspiracy & Security Frauds in Reverse Merger.

CGPN filed 8K on September 26, 2005 to report the Merger Agreement. However, on September 21, 2005, five days before the SEC filing, CGPN made a News Release, which caused majority of the new shareholders including Mr. Chien to begin purchasing the stock of CGPN.

The full text of the news release was only 123 words:

"Sep 21, 2005 (M2 EQUITYBITES via COMTEX) -- Cyber Group Network Corporation (CGPN) (OTCBB: CGPN.OB), a publicly traded Nevada corporation, announced on Tuesday (20 September) that it has entered into a definitive agreement to acquire Skystar Bio-Pharmaceutical Company Co Ltd, a biopharmaceutical company based in the Cayman Islands.

The acquisition will see *preferred shares of CGPN issued to Skystar* and these shall be *convertible*, in the aggregate, *into a number of shares of CGPN common stock*(emphases added). This would equal 89.5% of total outstanding shares of CGPN's common stock, if the shares were to be fully converted at the time of completion.

Weibing Lu, Chairman and CEO of Xian Tianxing and Skystar, will be the Chairman and CEO of CGPN upon closing of the acquisition."

This news release clearly told investors that the share *dilution* would happen only for issuance of new shares to primary Skystar shareholders.

Due to Regulation FD (Fair Disclosure, 17 CFR 240,243), CGPN should file 8K to report the News Release. But it didn't. This is evidence that CGPN made fraud to its shareholders.

The share price on September 21, 2005 was up sharply, and the trading volume was 49 million, highest in CGPN's history, then on next two days September 22 and 23, 2005, the trading volumes were 12 millions and 11 millions separately, still classified as heavy volume trading days of CGPN.

When CGPN filed 8K to announce that it had entered into a definitive agreement of share exchange on the evening of September 26, 2005, the trading volumes of about 11 million, 6 million and 2 million of shares on September 27, 28 and 29, 2005 separately, on average about 1/4 of the volumes after the News released. This approved that *most of the shareholders traded the stock based on the News Releases*, not on the 8K filings. Another reason may consider is that CGPN traded around one penny per share in 2005, 95% of shareholders of CGPN were small shareholders, invested about $1,000 or $2,000 in this stock, and they didn't read 8K (*the District Court on June 8, 2009, ruled out: it "may be true"*)(App.21).

In the 8K dated September 26, 2005, Cramer, Lowe and Wassung also falsified that they represented "a *majority* of the issued and outstanding capital stock of CGPN", to "*have approved*" and "*executed*" (emphases added) the Share Exchange Agreement while all official documents such as SEC filings, records of transfer agency showed that before November 7 (57 days away from September 20), 2005, Cramer owned 29,294,772 shares, Lowe owned 6,698,366 shares, Wassung owned 5,100,000 shares, and in total they owned 41,093,138 shares, represented a minor portion 23.2% of outstanding 177,188,665 shares.

Plaintiff considers Defendants behavior in the 8K of September 26, 2005 is a Shareholder Identity Theft, and Overt Act.

Despite that Cramer, Lowe and Wassung were Board of Directors, and had claimed (fabricated) unpaid compensation from CGPN, they didn't have the authorization to issue up to 72% of the company's shares to themselves.

Due to Regulation M-A [17 CFR §§229.1000 - 229.1016] and Exchange Act Rule 13e-3 -- Going Private Transactions by Certain Issuers or Their Affiliates (SEC specified that this rule also allying for changing control).

There are two essential things to be done:

- An appraisal report from outside, regarding of going private transactions fairness to nonaffiliated shareholders [17 CFR § 229.1015];

- A majority vote approval from *nonaffiliated shareholders* [17 CFR §229.1014(c)]: that means Cramer, Lowe and Wassung not allowed voting in the issue. The nonaffiliated shareholders, including Mr.Chien, would mostly likely, *reject* to issue majority capital to Cramer, Lowe, and Wassung.

To do reverse merger with Skystar also needs majority of CGPN shareholder to approve [17 CFR §229.1014(c)].

Unfortunately, there was no proxy created, for either merger with Skystar or issuing huge of new shares to three insiders, which violated Exchange Act Rules 14a, 14a-6.o and 14a-9.

When Plaintiff Mr. Chien accumulated the stocks, Chien questioned Mr. Lowe, and Mr. Cramer many times by send e-mails or phone calls. Defendants Lowe, and Cramer replied e-mails to Mr. Chien, and refused to disclose that they issued or will issue new shares for themselves.

There was another news release, dated November 8, 2005, to announce the merger completion with no disclosure of the material information of the issuance of about 98% of 323 million shares to Cramer, Lowe and Wassung.

On November 14, 2005's 8k filing, it disclosed that Cramer, Lowe and Wassung moved 98% of 323 millions of shares to their own accounts without any ex-disclosures and without any authorization.

When the company was dissolved on November 7, 2005, all of CGPN assets (shares) should distribute to shareholders on their shares' pro rata basis due to the shareholders liquidation rights, as written in the SEC filing Form 10SB12G (incorporated under the name of Hollywood Entertainment Network, Inc.), dated November 16, 1999:

"iii. *Liquidation Rights - upon liquidation, the holders of the common stock are entitled to receive pro rata all* *of the assets of the Company available for distribution to such holders* (emphasis added). "

The more shares, Defendants Cramer, Lowe, and Wassung had occupied before the completion of the merger, the less the other shareholders including Plaintiff, would possess after the completion of the merger. *The absolute number of more shares wrongly appropriated by Defendants Cramer, Lowe, and Wassung exactly equals to the number of shares missed from other shareholders including Plaintiff Chien* as shown in the following tables:

Table 1. Shares Ownership Comparison Under Different Distribution Assumptions On November 7, 2005 (after adjustment of 1 for 397 split).

Assumptions	Owned by Cramer, Lowe, and Wassung together (Shares)	Owned by All other shareholders including Plaintiff	Owned By Plaintiff (Shares)
1.Assuming 323 million shares distributed on pro rata to shareholder on 11/07/2005	292,344	968,307	44,384
2.Following ownership in	917,513	343,138	15,726

8K of 11/14/2005: 98% of 323 million shares issued to Cramer, Lowe & Wassung	(Increased 625,169 from 1.)	(Reduced 625,169 from 1.)	(Reduced 28,658 from 1.)

As share ownership shifted, the economy value moved from Plaintiff and other shareholders to Defendants as shown in Table 2, which adapted price of $5.56 per share, calculated from both an adjustment of 1 for 397 split and the closing price of CGPN was $0.014 on November 7, 2005.

Table 2. Share Value Comparisons Among Owners On November 7, 2005 (Due to 1 for 397 split, stock value adjusting to $5.56 from $0.014)

Assumptions	Owned by Cramer, Lowe, and Wassung together (Dollars)	Owned by All other shareholders including Plaintiff (Dollars)	Owned By Plaintiff (Dollars)
1.Assuming 323 million shares distributed on pro rata to shareholders on 11/07/2005	$ 1,625,433	$ 5,383,787	$ 246,775

2. Following ownership in 8K of 11/14/2005: 98% of 323 million shares issued to Cramer, Lowe & Wassung	$5,101,372 (Profits $ 3,475,939 from 1.)	$1,907,848 (Lost $ 3,475,939 from 1.)	$ 87,437 (Lost $ 159,338 from 1.)

From Tables 1 & 2 above, Plaintiff lost 28,658 (after an adjustment of 1 for 397 split) floating shares with market value of $ 159,338 on November 7, 2005 when CGPN was dissolved.

(3). Mr. Weibing Lu Assigned Conspiracy.

The first time to make SEC filing regarding to issue 98% of the 323million shares to Defendants Cramer, Lowe, and Wassung is on November 14, 2005, of the 8K, signed and executed by Weibing Lu. In the 8K, following events reported to take place simultaneously on November 7, 2005:

- CGPN commenced reverse merger with Skystar. Skystar was the surviving company. CGPN was sold, no longer existed, and the company's name changed to Skystar.
- Scott Cramer stepped down as CEO, President and Chairman, replaced by Weibing Lu.
- Defendants Cramer, Lowe and Wassung issued about 323 millions of new shares to themselves.

The 8K indicated that the reverse merger is a process of CGPN being sold to Skystar. To distribute shares of Skystar is to distribute the sold proceeds except the paid cash $120,000, among the sold CGPN shareholders.

It is Weibing Lu who assigned the job of distributing 1,260,651(detailed number announced in January 2006) shares of Skystar among CGPN's shareholders, to Cramer, Lowe and Wassung, who had privately conflicted interests with majority of other CGPN's shareholders. By negligence on duties, Defendants Cramer, Lowe and Wassung wrongly appropriated more shares from other shareholders, including Chien's 28,658 shares.

(4). Cramer, Lowe, and Wassung Got Unjust Enrichment

In Skystar's 2005 annual report, Skystar claimed it already adopted rule of Financial Accounting Standard Board("FASB") Statement No.123 (revised 2004), *Accounting for Stock-Based Compensation.* Due to the method, the market value of wrongly appropriated shares was worth on November 7, 2005 about $4.5 million while Cramer, Lowe, and Wassung_totally fabricated unpaid compensation about $0.9 million only.

SUMMARY OF ARGUMENT

The Court is far departure from the accepted and usual course of judicial proceedings such as to recognize legal document service of corporation agency, and how to execute FRCP Rule 15(a), and Rule 8(b), Rule 11(c)(1).

Plaintiff's tort, civil theft, conspiracy, and securities fraud allegations are not frivolous. A trial should grant.

ARGUMENT

1. The Court Should Accept the Skystar's Agent on Behalf of Weibing Lu's to Receive the Complaint.

In Second Action, the Court rejected Skystar's Nevada agency on behalf of Weibing Lu's to receive the Complaint as shown in the footnote 2 of App. 7 of the Ruing and Order, it wrote:

> "Defendant Weibing Lu has not been served and more than 120 days has passed since the filing of the complaint. Therefore, all claims against Mr. Lu are dismissed without prejudice, See Fed. R. Civ. Pro. 4(m)."

Although Weibing Lu is living in China, he is the Chairman and President of Skystar which is a USA domestic corporation. On December 21, 2005, Skystar filed 8-K to report its By-Laws revised after the reverse merger. In its Article 1 of the By-Laws it listed its corporation register agency in Nevada as its principal office:

> "The principal office of the Corporation in the State of Nevada shall be located at the offices of Nevada Corporate Headquarters, Inc., 101 Convention Center Drive, # 700, Las Vegas, Nevada 89109..."

Weibing Lu was being sued in the corporation capacity, and Weibing Lu never disclosed where except in China, he lives, and the corporation's principal office should legally be a place of its major officers' frequently contacted place, where the legal document service for its officers is proper.

Skystar is a Chinese operated small company. Due to securities act and exchange act, a foreign small company is not allowed to list in a USA stock exchange. Then Skystar took reverse merger with a USA shell company, and became a USA company to get USA financing. Skystar took legal advantage of a USA small company in financing, and it should also inherit the legal liabilities of a USA small company, and took the traditional civil action procedure for legal document service. As long as the Court admitted the Nevada agency is proper to receive legal documents on behalf of former Directors Lowe and Wassung, it should accept the Nevada agency's same service for Weibing Lu, but it didn't.

Further, the Second Action was initiated in Connecticut, and pursuant to General Statues of Connecticut, Sec. §52-59b9(c):

> "(c) Any nonresident individual, foreign partnership..., over whom a court may exercise personal jurisdiction, as provided in subsection (a) of this section, shall be *deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action* brought against the nonresident individual, foreign partnership ... *may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual*, foreign

> partnership... The process shall be served by the officer to whom the same is directed upon the Secretary of the State by leaving with or at the office of the Secretary of the State..." (emphasis added)

Which stated as long as the Connecticut state court has personal jurisdiction over Weibing Lu (due to Connecticut General Status: "Sec. § 52-59b", it is), and Weibing Lu is well served by a Marshall in Connecticut upon its Nevada agency address.

In the First Action, Plaintiff's former counsel also served the Complaint to Weibing Lu through the corporation agent. However, after the former counsel received the opposed opinions from Defendants and District Court considering improper of Weibing Lu's legal document service (in fact it is proper), he wrongly withdrew Weibing Lu as a defendant.

2. The Court Erred in Applying FRCP Rule 15(a) to Mr. Chien's Request of Amending His Complaint in First Action.

In First Action Judge Mark Kravitz believed that CGPN owned about $1 million debt to Defendants Cramer, Lowe and Wassung, and he made the following statement in the ruling:

> ""CGPN " had ...liabilities... approximately of $1 million which was owned to Messrs. Cramer, Lowe and Wassung, the company's officers...on November 7, 2005,...CGPN issued approximately 316,461,335 shares of common stock to Messrs. Cramer, Lowe and Wassung,

> in payment of debts owned those individuals ...." (App.44)"

In the Second Action's ruling of "Count 6. Conspiracy" (App.27), he has opposed view:

> "Mr. Chien alleges that Defendants conspired to fraudulently obtain Skystar stock in exchange for what Mr. Chien believes was fabricated unpaid compensation ... Mr. Chien appears to allege that the conspiracy began as early as 2003, but there is no doubt that it ended in November 2005, with completion of the reverse merger."

Basically, *in Second Action,* the Court *found* that Defendants *claimed $1 million unpaid compensation in First Case was a fraud.*

The second action would not take place if the court had acted properly in First Action when Mr. Chien prepared to make new alleges after withdrew his former counsel, but the Court wrongly executed process of FRCP Rule 15(a) regarding 'leave to amend" in First Action.

Details are as follows:

In First Action, the Court held oral argument on July 8, 2008, and Mr. Chien and his former counsel attended, and Mr. Chien felt that his former counsel hadn't presented this case well, and asked his counsel to withdraw. During an in-court conference on July 11, 2008, Andrew Chien, appearing as pro se, primary showed his different approach for this case with his former counsel, and requested that the court delaying judgment and gave him two to three week time to make an amendment. Unfortunately, the Court didn't give Mr. Chien a chance to amend his Complaint. On July 17, 2008, only four business days later after the oral argument, the Court issued "Ruling and Order" (App.41-64).

On App. 50 of the Judge's ruling:

> "During this argument, Mr. Chien appeared to be making claims beyond those alleged in his Amended Complaint. As a consequence, the Court informed Mr. Chien that the Court would decide the pending Motion to Dismiss on the basis of the allegation in the Amended Complaint and that if, after the Court's ruling, Mr. Chien wished to amend his complaint further, he could move the Court-upon showing of good cause- to permit a further amendment, providing a copy of any proposed amended complaint along with his motion."

And on App.64, the ruling ordered:

> "...if Mr. Chien would like the Court to consider whether it would allow any amendments to the Amended Complaint, he must file a motion to that effect no later than August 7, 2008."

On July 28, 2008, Mr. Chien filed a motion attached with a proposed Amended Complaint, first time in the action to allege "Tort", "Civil Theft" and "Conspiracy" against defendants, and pointed out that Defendants claimed unpaid compensation were fabricated. Rule 15(a) of FRCP declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. The Court should accept Mr. Chien's Amendment Complaint filed on July 28, 2008.

Unfortunately, the Court's order granting a Motion to Dismiss a case in its entirely is a final decision under 28 U.S.C. § 1291. The Clerk of the Court entered Judgment on the docket sheet dismissing all claims against all Defendants. Mr. Chien was compelled to file appeal. Then, the Court does not believe that it currently has jurisdiction to consider Mr. Chien's Motion to Correct/Amend. Mr. Chien's right for amending his former counsel's complaint was denied.

Here, the Court decidedly did *not* give Mr. Chien leave to amend, but rather allowed Mr. Chien to file a motion to *argue* that he should be given leave to amend. The Court has found no precedent that addresses this exact situation.

The real reason for the court didn't give Mr. Chien a chance to amend his complaint showed on App. 80 foot note 5, on Ruling and Order (App.65-91) made on February 5, 2009 to sanction Mr. Chien, as follows:

> [5] "Mr. Votre (Note: Chien former counsel) points out that under Second Circuit case law, sanctions are unwarranted when the court does not give the plaintiff a chance to fill in the deficiencies in the complaint through discovery. See Commercial Cleaning Serv., LLC v. Colin Serv. Sys. Inc., 271F. 3d 374,386(2d Cir. 2001).

> However, in this case, Mr. Chien was in possession of the relevant information and *no amount of discovery would have corrected the material falsehoods in the amended complaint*" (emphasis added).

The Court didn't believe that to enter discovery would change the conclusion of this case which approved wrong in Second Action.

3. The Courts Erred the Rulings, not Enforcing GAAP Accounting Principles of FASB Statement No. 123(R) (revised 2004).

Following Securities Act of 1933, Section 19(b), and Sarbanes-Oxley Act of 2002, Sec. 108 (a), SEC requires that generally accepted accounting principles ("GAAP") be followed in financial reporting by publicly-traded companies. Currently, the Financial Accounting Standards Board (FASB) is the highest authority in establishing GAAP for public and private companies.

Due to FASB Statement No. 123(R) (revised 2004), "Accounting for Share-based Compensation", the value of the share-based compensation should count on the share price of the reporting or venting day. In this case, the issued (venting) day was on November 7, 2005 with share closing price $0.014 per share. Then the total value of the issued shares would be:

323 million * $0.014 = $ 4.5 million

Among the $4.5 million, Defendants Cramer, Lowe and Wassung got overpayment of $ 3.5 million assuming that their fabricated about $ 0.9 million unpaid compensation were true (in fact it is false). The overpayment was due to Defendants Cramer, Lowe and Wassung wrongly appropriated more shares. If the overpayment weren't happened, they only got about 70 million shares to off-set their fabricated unpaid about $ 0.9 million compensation, therefore their wrongly appropriated shares would reduce over 75%; in an alternative way, if the share purchasing price of defendants Cramer, Lowe and Wassung is the same as that ($0.0225/share) paid by former President Mr. Serrano, they had only got about 40 million shares, therefore their wrongly appropriated shares would reduce over 87%.

However, the overpayment of $3.5 million caused their falsified accounting because the overpayment should charge against the earning in the balance sheet of the financial statement of the corporation due to GAAP, but Skystar didn't do it.

In the first action, the court erred in not adapting FASB Statement No. 123(R), and agreed with defendants' back-dating accounting as showed in its Ruling (App. 45):

> "CGPN, now Skystar also filed a Form 10-K with the SEC on or about April 17, 2006. That report stated as follows:
> On November 7, 2005, the Company issued 201,849,516 (pre 1-for-397 Reverse Split) shares of common stock valued at approximately $0.0025 per share (the average price over the last 90 trading days prior to September 1, 2005, the date on which the

> Board authorized the issuances for amount owned to Mr. Cramer, Mr. Lowe and Wassung) to its former Chief Executive Officer and current Director, R. Scott Cramer as payment for accrued salary and expenses owned to him in the amount of $573,270….."

The above back-dating reporting was a scam. Why?

(1) The CGPN's board meeting on September 1, 2005 is a non-existing event.

In the First Amended Complaint of the Second Action, plaintiff listed this annual report is one of the thirty falsified documents made by Defendants, and pointed out that:

> "(v)The Board of CGPN made decision to issue about 323 million shares to themselves on September 1, 2005 was a false statement because CGPN never showed, to either the Court or SEC and public, any evidence of board meeting minutes or telephone conference records, to approve that such Board authorization existed. "

In the response, Defendants did not follow FRCP Rule 8(b): Defendants should deny or admit every element which Plaintiff claimed, and it just avoided to answer the allegation. That means Defendants admitted tacitly that Plaintiff's claim is true, and the board meeting is a non-existing event.

(2) Defendants Cramer, Lowe and Wassung didn't have authorization to issue majority shares to themselves without a non-affiliated shareholder vote.

(3) Taking September 1, 2005 as the granting date is violating the definition of the granting day of FASB Statement No. 123(R) (revised 2004).

The grant day of stock option or stock itself especially for penny stock of CGPN is very critical as pointed by SEC:

> "But with the stock market frothing as it was in the late 1990s — those days of irrational exuberance — time was money. A day or two difference in the stock option grant date could have a tremendous impact on the value of the grants."(Chatman Thomsen, Linda (2006). "Speech by SEC Staff: Options Backdating: The Enforcement Perspective", http://www.sec.gov/news/speech/2006/spch103006lct.htm#foot1)

Because the stock price volatile daily, FASB Statement No. 123(R), put emphasized on the calculating the value of granting day, and specified that *granting day* should be *reporting day through the settlement date* (http://www.fasb.org/summary/stsum123r.shtml):

> "A public entity will initially measure the cost of employee services received in exchange for an award of liability instruments based on its current fair value; the fair value of that award will be remeasured subsequently at each

> reporting date through the settlement date. Changes in fair value during the requisite service period will be recognized as compensation cost over that period."

It is clearly that *the reporting day should be ahead of settlement day, and frequently the reporting day should be the same or ahead of granting day. Otherwise, it is impossible to make an accurate accounting.*

In this case, Skystar reporting to SEC of the issuance of 323 million shares was on November 14, 2005 and the settlement day with stock transfer agency was on November 7, 2005, the grant day at earliest should be November 7, 2005 due to FASB Statement No. 123(R).

The date when Skystar reported the granting day as September 1, 2005, was April 17, 2006, five month later than settlement day. This falsified story was made in the 2005 annual report 10-K. However, on page F-18 of Form 10-K for 2005, it declared to have adopted SFAS No. 123(R) (revised 2004).

Obviously this is an evidence of fraudulent concealment of Skystar in financial auditing and reporting.

(4) Former president Serrano's settlement shares' price much higher.

Beyond Defendants Cramer, Lowe and Wassung, there is former president Serrano to whom CGPN owned unpaid compensation $45,000, however, the settlement shares only 2 million. The settlement share price of Mr. Serrano is as 9 times high as the share price which the defendants Cramer, Lowe and Wassung settled with Skystar. All those shares were issued on the same day for the same purpose, and using the same standard. Why should the counted share unit price between different persons have nine times difference?

(5) The auditing firm Moore Stephens Wurth Frazer & Torbet LLP is a firm which lacks internal control and training, and was disciplined by SEC in October 2010 including to stop taking any new customers in China.

4. Tort, Civil Theft and Conspiracy Allegations are not Derivative Issues.

(1) In the Ruling (App. 27), the Court wrote:

> " Mr. Chien does not allege that Defendants stole from him personally. Rather, he alleges that Defendants stole from the corporation, which in turn decreased the value of his stock. This is a derivative claim,...Moreover, civil theft is governed by three-year statute of limitations for tort actions...Mr. Chien cannot avail himself of the equitable tolling provision found in Conn. Gen Sta. § 52-595 because he was aware of all of the facts relevant to his civil theft claim in November 2005."

The court made three errors in this ruling, as addressed in follows:

(a) Civil theft only happened in the CGPN, not in Skystar, and the Court erred in mixed two corporations of CGPN and Skystar into one.

Before the closing of the reverse merger, there were two corporations: CGPN and Skystar. Defendants only stole shares from CGPN, not from Skystar. Regardless of how many shares Defendants had stolen from CGPN, the total shares of Skystar will not miss any.

The Connecticut Supreme Court has clarified that civil theft only needs to establish proof of by a preponderance of the evidence, and has held that statutory or civil theft is synonymous with "larceny." See Hi-Ho Tower v. Con-Tronics, Inc., 761 A.2d 1268, 255 Conn. 20, 44 (Conn. 2000). In Connecticut General Status § 53a-119, "Larceny" includes:

> "Embezzlement. A person commits embezzlement when he wrongfully appropriates to himself or to another property of another in his care or custody."

In the closing process of merger, no any corporation shares of CGPN being left because all shares of CGPN after exchanging for a fixed number of Skystar shares, would be distributed into individuals. CGPN is a dissolved corporation. The distribution of Skystar shares to all CGPN shareholder individuals was in Defendants' care or custody. In the process of distribution, Defendants stole a big portion of Skystar's shares as their own first, then distributed the remaining small portion to other individuals. There is no any difference that defendants stole shares from the corporation or stole shares from other CGPN shareholders individually because all following process happened simultaneously: CGPN dissolved; CGPN shareholders distributed Skystar's fixed number of share; someone took more, some took less and all distribution proportion in the custody process of Defendants. All other shareholders had no vote rights, no due diligence, and no proxy; no pre-information regarding how the shares of Skystar would be distributed.

The remedy process is another standard to judge Defendants' stolen shares from where: the corporation or individuals. Defendants could now return their wrongly appropriated shares neither to CGPN because CGPN no longer existed; nor to Skystar because Skystar would have violated the reverse merger agreement to give 10.5% of then total shares to former CGPN shareholders; only to then CGPN's shareholders individually. This approved that Defendants stole shares from other shareholders individually, not from the corporation.

Any share recovery by other then CGPN shareholders including Mr. Chien from Defendants Cramer, Lowe and Wassung will not hurt Skystar because of no need of issuing any shares of Skystar.

(b) The stock value of Skystar decreased due to ethics violation is a different issue with civil theft claim.

Civil theft claims showed that the company's internal control is poor which will adversely affect the stock price. However, this is a different issue with civil theft claim.

As previous mentioned, due to the 323 million shares wrongly appropriated by Defendants, Mr. Chien's distribution of Skystar's shares reduced to 15,726 from deserved 44,384 shares.

Mr. Chien purchased shares at average $5.11 per share, and sold at $0.99 to $ 1 per share. If he had possessed 44,384 shares, he could remain $44,384 after the sale, which would have greatly reduced the investment loss as compared with about $15,000 left currently.

The total Skystar's shares will not be changed whether or not Mr. Chien being distributed 15,726 shares or 44,384 shares; therefore there is no dilution for Skystar's shares.

(c) The Second Action is within three-year statute of limitations for tort actions.

This is true that Defendant stole the shares in November 2005. However, the white-color crime needs fraudulent concealment, which is the 2005 annual report which published on April 17, 2006, cited several times by the Court in the ruling of First Action. Without the annual report, Mr. Chien and the public didn't know the fraudulent concealment including the falsified accounting, and they would miss the critical and essential information to commerce the Second Action which was initiated at the end of 2008, published in the website of

Connecticut state court in January 2009, within the three year period.

5. The Court Erred to Strike Plaintiffs Allegation of Security Violation of Section 10(b), the Rule 10(b)-5 Promulgated Thereunder, and Section 20(a) of the Exchange Act.

One of the reasons in which the Court denied Plaintiffs allegation of Defendants Securities Law Violation is the loss causation. In the Ruling of First Action (App. 60), it wrote:

> "if, as Mr.Chien alleges, the disclosure of the issuance of additional shares led to his losses, one would have expected the share price to drop following the September 26 disclosure, not increase".

The mistake of this ruling is that the Court abused the Exchange Law. In the ruling of First Case the Court said, no proxy (vote) "may or may not state a cause of action for security fraud" (App. 57). However, Exchange Act, Rule 14a-3.a.3 and Rule 14a-16, specified: Registrant is not allowed to apply "Internet Availability of Proxy Materials" that relates to a business combination or tender offer, Security Act Rule 165 c.2., transaction.

Mr. Chien did some investigation, and got conclusion that 95% of shareholders of CGPN were small shareholders, and they didn't read 8K, and the Court on June 8, 2009, ruled out: it "may be true" (App.21). Therefore to use the date of 8-K filing as the date of investors fully informed is wrong. This is why the stock market didn't have response to the bad news.

In Exchange Act, Rule 14a-6.o "Solicitations before furnishing a definitive proxy statement", it clearly stated proxy should being "published, sent or given to security holders".

CGPN didn't send any proxy (Form DEF 14C) to shareholders until at the end of January 2006, and informed shareholders that there would be 1 for 397 stock reverse split. At that time the shareholders shocked and learned there were 323 million of new shares issued to three insiders. Then buyers stopped to buy the shares, trading volume shrinking, and caused share price dropped gradually to reach share value a high percentage (over 60%) loss.

To establish liability under §10 (b) and Rule 10b-5, a private plaintiff must also prove that the defendant acted with "scienter". Civil-theft allegation and its consequence of creating unjust enrichment for Defendants Cramer, Lowe, and Wassung can prove that "defendants had both motive and opportunity to commit the fraud." Kalnit, 264 F.3d at 138.

It is obvious that the Individual Defendants acted as controlling persons of within the meaning of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a) by virtue of their executive positions, and/or Board membership,.

6. Appeals Second Circuit Ruling in this Case Conflicted with Principles in NYCERS v. Jobs (No.

08-16488, D.C. No.5:06-cv-05208-JF, 9th Cir.2010), Regarding Shareholder Direct Action Right.

Due to general rule of Exchange Act 14a, CGPN had the obligation to publish a proxy asking the approval from shareholders regarding the reverse merger process with Skystar, but it didn't. Shareholders vote rights were deprived of, and shareholders including Mr. Chien had no opportunities to do due diligence about the issuance of 323 millions of shares.

We can classify CGPN behavior of intended to escape proxy 14(a) process as a misleading "proxy". The loss causation is the "civil theft", which causing other shareholders missed shares individually. Therefore the direction action is allowed.

In 2004, the Delaware Supreme Court stated that an analysis of whether a claim is direct or derivative

> "must be based solely on the following questions: Who suffered the alleged harm - the corporation or the suing stockholder individually - and who would receive the benefit of the recovery or other remedy?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1035 (Del.2004).* A Plaintiffs classification of the suit is not binding. *Id.* To establish a direct action, "the stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id. at 1039.*

In our case, CGPN is no longer existed, no more injury. What Defendants Cramer Lowe and Wassung illegally got were fully at other shareholder individuals' expenses. Defendant Scott Cramer alone has over $3 million worth of Skystar's stock, part of them is a result of civil theft, unjust enrichment and fraudulent concealments he made from 2003 till today. To disgorge his part of the unjust enrichment to Andrew Chien will not hurt the distinguished corporation of CGPN. Thus under state law, Andrew Chien's missing §14(a) claim for injury to its rights to a (fully informed) vote is a direct claim, the court erred in dismissing the claims on the ground that the claim was derivative and had to be pleaded as such.

7. The Court Erred in Dismiss under FRCP 12(b)(6) by not Drawing All Reasonable Inferences in Favor of the Non-moving Party.

In the Memorandum submitted on July 14, 2009 to Appeals Second Circuit, or First Amendment of District Court in Second Action, Plaintiff listed the detailed contents of the falsify business activities, false accountings, and fraudulent concealments following standards of FRCP 9(b), contained in over thirty SEC filings or News Release item by item, one example is:

> "6. 10KSB for the fiscal year ended December 31, 2004, filed on May 19, 2005, signed and certified, pursuant to Section 302, and 906 of the Sarbanes-Oxley Act of 2002, by Scott Crammer as CEO & CFO respectively.

Material Misstatement & False Accounting:

(a) Add mostly fabricated $61,443 unpaid compensations on the accumulated item of "Due to officers", then to issue 32,540,000 shares of common stock with market value of $192,900 to Cramer, Lowe and Wassung, and to reduce the total value of "Due to officers" to $636,994, which were material false accountings for the fourth quarter of 2004.

(b) Misleading business activity descriptions:

It reported: "We are currently marketing PPIRT to government agencies, corporations and OEM's," and "The new versions will have significant enhancements and be marketed specifically to Government Agencies, Corporations and Consumers."

It concealed the information of operation ceased, and no business activities in this quarter. It also concealed the information that Cramer, Lowe and Wassung didn't have any professional knowledge to develop the product called "PPIRT", Lowe had another full time job, and didn't do any market at all, and Wassung did nothing, although all of them fabricated the employee status and took fully compensation payment----------------------------

14. 10KSB for the fiscal year ended December 31, 2005, filed on May 17, 2006, signed by Weibing Lu, Erna Gao, Wei Wen, Xinya Zhang and Scott Cramer, and certified...

by Weibing Lu as CEO & Erna Gao as CFO respectively.

(a)Material Misstatements & False Accounting:

(i)Missed to report paid-in capital of $4.5 million in both Balance Sheet and Shareholders' Equity Statement came from to issue about 323 millions of common stock;

...

(v)The Board of CGPN made decision to issue about 323 million shares to themselves on September 1, 2005 was a false statement because CGPN never showed, to either the Court or SEC and public, any evidence of board meeting minutes or telephone conference records, to approve that such Board authorization existed. .....

(b) Fraudulent concealments:

....

(iii) On May 10, 2006, the auditing firm Moore Stephens Wurth Frazer and Torbet, LLP issued report:

"In our opinion, the financial statements referred to above present fairly ...... in conformity with accounting principles generally accepted in the United States of America."

In the response, Defendants did not follow FRCP Rule 8(b): Defendants should deny or admit every element which Plaintiff claimed, and it just avoided to answer these evidences and allegations. That means

Defendants admitted tacitly that Plaintiff's claims are true, and the Court should draw all reasonable inferences in favor of Andrew Chien and assuming Mr. Chien's allegations true(indeed they are true) in the ruling of granting defendants Motion for Dismiss under FRCP 12(b)(6) in the ruling of Second Action. For example, the court should assume that Plaintiff allegation of September 1, 2005's CGPN board meeting a fabricated story is true, and Skystar didn't take overpayment to Defendants as overhead expenses in its balance sheet etc.. But it didn't, and just gave general conclusive denies in the ruling.

8. The Court Departed from the Trial Court's Procedure to Conclude that Defendants Law Firm no Ethics Errors, Even not Asking Them to Respond Mr. Chien's Motion of Sanction which Including Perjury Allegation with Evidence.

In Second Action, Mr. Chien found that Defendants' law firm Richardson & Patel helping Defendants making fraudulent concealments in a series of SEC filings, and lied to the court, and submitted to the Court falsified (perjury) information (such as stock quote, trading volume, and intended conceal the New Release made on September 21, 2005, and sequentially three days with heaviest trading volume, and much volatile stock price in the history), which the Court adapted in the ruling of First Action. In additional, Richardson & Patel lost its independence as a counsel in the lawsuits because it owned shares of Skystar and engaged in endorsement of Skystar's $20 million financial activities as early as the summer of 2006, which Richardson & Patel admitted in its news release made on July 9, 2009, but it never disclosed to the court in two cases. In general, Richardson & Patel violated Rule 1.2 (b), 1.2 (d) Rule 1.8, Rule 2.1 & Rule 5.4, Rule 3.3 (a) and Rule 4.1 of Ethics Codes, as published in Official 2009 Connecticut Practice Book.

Mr. Chien wanted to add Richardson & Patel as one Defendant which was rejected by the Court. However, the Court made conclusion that Richardson & Patel didn't have ethics issue even before Plaintiff Submitted Motion of Sanction against them, as showed in the footnote 1 of App. 7 of the Ruing and Order, it wrote:

> "......Obviously, Richardson & Patel cannot be responsible for an injury Mr. Chien claimed he suffered in 2005 if the law firm was not even involved in these matters until 2007. Moreover, the only concrete allegation Mr. Chien makes against Richardson & Patel is that its attorney lied to the Court in this lawsuit and Mr. Chien's previous one. Other than this wholly conclusory assertion. Mr. Chien has alleged nothing that would suggest that Richardson & Patel acted improperly or unethically in any manner...."

On August 5, 2009, Plaintiff filed Motion for Sanction and "Memorandum of Laws and Facts to Support Motion for Sanction and Perjury Penalty against Counsels of Defendants" in the District Court. The Memorandum pointed out five counts of the violations of ethics codes, by law firm Richardson & Patel and its lawyer Ms. Jody Borrelli. Every allegation has evidence from either of the news release of Richardson & Patel, or their SEC filings on behalf of Skystar, or the document they submitted to the court.

Following traditional court procedure of FRCP 11 (c)(1) "If, after notice and a reasonable opportunity to respond, the court determines, …." which requires the Court should ask Richardson & Patel to give a response then making ruling in the sanction process. However, the court jumped out that step, immediately denied Mr. Chien's Motion without asking response from Richardson & Patel, and gave no any analysis why to reject Mr. Chien's Motion. The trial court's judge action likes a partner of Defendants' law firm.

CONCLUSION

This writ of certiorari should be granted.

United States Court of Appeals, Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Sued, in the City of New York, on the twenty-fifth day of October, two thousand and ten.

ANDREW CHIEN:
PLAINTIFF-APPELLANT

-v-

Nos.08-3960-cv(L)
09-1407-cv(con.)
09-2806-cv(con.)
09-3535-cv(con.)

SKYSTAR BIO PHARMACEUTICAL COMPANY, SCOTT CRAMER STEVE LOWE, DAVID WASSUNG

Defendants-Appellees

Andrew Chien having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that petition is denied.

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk of Court

08-3960-cv (L), 09-1407-cv (con.), 09-2806-cv (con.), 09-3535-cv (con.)

CHIEN v. SKYSTAR BIO PHARMACEUTICAL CO.

United States Court of Appeals, Second Circuit
SUMMARY ORDER

Rulings by summary order do not have precedent effect. Citation to summary orders filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary .order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Sued, in the City of New York, on the twenty-sixth day of May, two thousand and ten.

Present:
JOSÉ A. CABRANES,
ROBERT A. KATZMANN,
Circuit Judges,
J. GARVAN MURTHA,
District Judge.[1]

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[1] The Honorable J. GARVAN MURTHA, Senior Judge of the United States District Court for the district court of Vermont, sitting by designation

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ANDREW CHIEN:
PLAINTIFF-APPELLANT
-v-

Nos.08-3960-cv(L)
09-1407-cv (con.)
09-2806-cv (con.)
09-3535-cv (con.)

SKYSTAR BIO PHARMACEUTICAL
COMPANY, SCOTT CRAMER
STEVE LOWE, DAVID WASSUNG

Defendants-Appellees

For Plaintiff-Appellant	Andrew Chien, New Haven, CT, pro se
For Defendants-Appellees	Timothy Herring, Cummings & Lockwood LLC, Stamford, CT.

Appeal from judgments of dismissal and orders of the United States District Court for the District of Connecticut (Mark R. Kravitz. *Judge)*

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments and orders of the District Court be **AFFIRMED**.

Plaintiff-appellant Andrew Chien ("plaintiff" or "Chien"), *pro se,* commenced two separate proceedings against defendants-appellants Skystar Bio Pharmaceutical Co., Scott Cramer, Steve Lowe, and David Wassung (jointly, "defendants") alleging claims of securities fraud. The District Court dismissed both of plaintiff's complaints and issued sanctions against plaintiff, as well as his attorney from the first proceeding. Chien proceeded *pro se* in his second proceeding in the District Court and does so here as well. Plaintiff now appeals from (1) the District Court's judgments dismissing his complaints in both securities fraud proceedings; (2) the District Court's order denying plaintiff's motion to amend in the first proceeding and granting partially defendants' motion for sanctions against Chien; and (3) the District Court's order denying Chien's motion for sanctions and granting, in part, defendants' motion for sanctions in the second proceeding. We assume the parties' familiarity with the remaining facts, procedural history, and issues on appeal.

We review *de novo* the District Court's decision dismissing a complaint pursuant to Rule 12(b)(6). *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). "To survive dismissal, [a] plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient `to raise a right to relief above the speculative level.' " *ATSI Comms., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). When a plaintiff proceeds *pro se*, as here, we are "obliged to construe his pleadings liberally, particularly when they allege civil rights violations." *McEachin v. McGuinnis,* 357 F.3d 197, 200 (2d Cir. 2004).

We review the imposition of Rule 11 sanctions for "abuse of discretion." *See, e.g., Corroon v. Reeve,* 258 F.3d 86, 92 (2d Cir. 2001). "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks, citations, and alterations omitted).

After conducting an independent review of the record and case law, we conclude, substantially for the reasons stated in the well-reasoned orders and judgments of the District Court, that the dismissal of plaintiff's complaint was free of error and that the District Court did not "abuse its discretion" in issuing moderate sanctions against plaintiff in light of the circumstances and facts on the record. *See Chien v. Skystar Bio Pharm. Co.*, No. 3:09-cv-149, 2009 WL 2487983 (D. Conn. Aug. 12, 2009); *Chien v. Skystar Bio Pharm. Co.*, 623 F. Supp. 2d 255 (D. Conn. 2009); *Chien v. Skystar Bio Pharm. Co.*, 256 F.R.D. 67 (D. Conn. 2009); *Chien v. Skystar Bio Pharm. Co.*, No. 3:07-cv-781, 2008 WL 4198511 (D. Conn. Sept. 11, 2008); *Chien v. Skystar Bio Pharm. Co.*, 566 F. Supp. 2d 108 (D. Conn. 2008).

CONCLUSION

We have considered each of defendant's arguments on appeal and find them to be without merit.

For the reasons stated above, we AFFIRM the judgment of the District Court.

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECICUT

Andrew Chien)
Plaintiff) No. 3:09CV149
v.) (MRK)
SKYSTAR BIO PHARMA.)
Co. et al.)
Defendants)

RULING AND ORDER

Pending before the Court is Defendants' Motion to Dismiss For Failure to State a Claim [doc. #12], their Motion to Dismiss For Lack of Personal Jurisdiction [doc. #13], and their Request for Judicial Notice [doc. #14]. After the Court provided Mr. Chien notice of the Motions to Dismiss [doc. #16], he filed a Motion for Leave to Amend [doc. #22] and attached a First Amended Complaint. Defendants filed an Objection to the Motion to Amend [doc. # 25], and Mr. Chien responded both to Defendants' objection and to Defendants' Motions to Dismiss. *See* Mem. In Opp'n to Mot. to Dismiss [doc. #27]. The Court granted Mr. Chien's Motion for Leave to Amend and dismissed with prejudice all claims from the original Complaint that were not reasserted by Mr. Chien in his First Amended Complaint. *See* Order [doc. #29]. The Court also informed the parties that it would consider all briefing on the Motions to Dismiss to apply to Mr. Chien's First Amended Complaint and that no further briefing was required.

Nevertheless, Mr. Chien filed a second Motion for Leave to Amend [doc. #30], in which he seeks to add

Richardson & Patel, the law firm representative representing Defendants, as a Defendant in this case. The Court denies Mr. Chien's motion. The Court has already allowed Mr. Chien to amend his complaint once and Mr. Chien has not provided any reason why he waited until this late date to seek to add an additional party, one that he was well aware of from the outset. Moreover, while "leave to amend should be freely granted when justice so requires, courts deny such leave where the proposed amendment would be futile." *Pavano v. Town of Wallingford*, No. 3:08CV221(MRK), 2008 WL 2622768, at * 3 (D. Conn. June 26, 2008). As explained below, Mr. Chien's amendments are futile for a multitude of reasons.[1] Therefore, the Court denies Mr. Chien leave to amend his complaint a second time and will in this Ruling address only the claims raised by Mr. Chien in his First Amended Complaint.[2]

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[1] In addition to the reasons applicable to all of Mr. Chien's claims, his claims against Richardson & Patel are futile for independent reasons as well. For one, the injury Mr. Chien alleges in his First Amended Complaint occurred in November 2005, while he claims that Richardson & Patel engaged in fraud from 2007 to the present. Obviously, Richardson & Patel cannot be responsible for an injury Mr. Chien claims he suffered in 2005 if the law firm was not even involved in these matters until 2007. Moreover, the only concrete allegation Mr. Chien makes against Richardson & Patel is that its attorneys lied to the Court in this lawsuit and Mr. Chien's previous one. Other than this wholly conclusory assertion, Mr. Chien has alleged nothing that would suggest that Richardson & Patel acted improperly or unethically in any manner. Defending their clients against fraud allegations does not amount to conspiracy to commit fraud.

[2] Because the Court concludes that Mr. Chien has failed to state a claim, the Court does not reach Defendants' alternative argument that the Court lacks personal jurisdiction over the individual Defendants. Defendant Weibing Lu has not been served and more than 120 days has passed since the filing of the complaint. Therefore, all claims against Mr. Lu are dismissed without prejudice. *See* Fed. R. Civ. Pro. 4(m).

I.

This is not the first occasion that the Court has had to address the dispute between Mr. Chien and Defendants. Mr. Chien – then represented by counsel – originally filed suit against these same Defendants in May 2007, alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. *See Chien v. Skystar Bio Pharmaceutical Co.*, 03:07-cv-781(MRK). After giving Mr. Chien the opportunity to amend his complaint in that first action, the Court dismissed the case in its entirety in July 2008, holding that Mr. Chien had failed to plead fraud and loss causation. Shortly before the Court dismissed his complaint, but after briefing and oral argument on the motion to dismiss, Mr. Chien's counsel withdrew his appearance on behalf of Mr. Chien, and Mr. Chien decided to proceed *pro se*. Defendants then filed a motion for sanctions under the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(c)(1), which provides for mandatory sanctions under Rule 11 for frivolous securities actions. The Court awarded partial sanctions against Mr. Chien and his former counsel in February 2009. *See Chien v. Skystar Bio Pharmaceutical Co.*, 03:07-ev-781 (MRK), Ruling and Order [doc. # 106]. Mr. Chien appealed both the Court's decision dismissing the complaint and the Court's sanctions order. *See* Notices of Removal [docs. # 77, 118].

Meanwhile, in January 2009, Mr. Chien – still proceeding *pro se* – re-filed his case against Defendants in state court. Defendants promptly removed the state-court action to federal court. *See*

Notice of Removal [doc. # 1]. Defendants then filed their Motions to Dismiss [docs. # 13,14] and Request for Judicial Notice [doc. # 15]. Although Mr. Chien alleges many new causes of action in this second case, his new claims arise from the same events as those asserted in his first case. Thus, the Court will assume the parties' familiarity with the facts and will not repeat them here. *See Chien v. Skystar Bio Pharmaceutical Co.*, 03:07-cv-781 (MRK), Ruling and Order [doc. #71] (recounting the underlying facts).

Defendants argue that the case should be dismissed on the grounds of *restaurant judicata*.[3] Typically, the doctrine of *restaurant judicata*, or claim preclusion, "bars not only those claims or legal theories that were asserted in the prior action, but also those legal claims or theories that could have been asserted, regardless whether they were in fact raised by the parties, so long as they arise from the same transaction that formed the basis of the prior action." *Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 153 (D. Conn. 2005). The doctrine "prevents the subsequent litigation of any ground of recovery that was available in the prior action, whether or not it was actually litigated or determined." *Balderman v. United States Veterans Admin.*, 870 F.2d 57, 62 (2d Cir. 1989). As the Second Circuit has explained:

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[3] The defense of *restaurant judicata* may be raised on a Rule 12(b)(6) motion to dismiss if "all relevant facts are shown by the court's own records." *AmBase Corporate. V. City Investing Co. Liquidating Trust*, 326 F.3d 63, 72 (2d Cir. 2003) (affirming dismissal of complaint on *res judicata* grounds); *see. e.g., Waldman v. Village of Kiryas Joel*, 207F.3d 105, 114 (2dCir.2000); *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000); *Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 144 (D. Conn. 2005). Moreover, in ruling on a motion to dismiss, a court is not limited to the factual allegations of the complaint but may consider "documents attached to the complaint as exhibits or incorporated in it by reference, to matters of which judicial notice may be taken or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc..*, 987 F.2d 142, 150 (2d ir. 1993). Therefore, in considering a *restaurant judicata* defense, a court may judicially notice prior pleadings, orders, judgments, and other items appearing in the court records of prior litigation that are related to the case before the Court. *See, e.g., Ambase*, 326 F.3d at 72-73; *Hackett*, 2003 WL 23100328, at *2.

> In earlier times the doctrine of restaurant judicata could be involved only to bar relitigation of the same cause of action already litigated and determined. . . . The modern transaction view of the doctrine of restaurant judicata, however, does not require that the claim subsequently asserted be based on [the] same cause of action to be barred, but permits the doctrine to be involved to bar litigation between the same parties if the claims in the later litigation arose from the same transaction that formed the basis of the prior adjudication .... Under the modern rule, ordinarily, a transaction gives rise to only one claim regardless of the number of ways that the claim may be asserted.

Ambase Corporate. V. City Investing Co. Liquidating Trust, 326 F.3d 63, 73 (2d Cir. 2003) (citations omitted); *see also Johnson v. Community'r of Corrections*, 288 onn. 53, 66 (2008) ("The doctrine of *restaurant judicata* provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made.").

Given that Mr. Chien's claims in this case arise from exactly the same events (i.e., the reverse merger completed in November 2005) and includes exactly the same parties as his previous lawsuit, the Court concludes that his lawsuit is barred by the doctrine of *res judicata*. The new facts alleged by Mr. Chien merely add embellishment or new labels to his previous cause of action. *See Sand v. Bank of New York*, 929 F.2d 916, 919 (2d Cir. 1991) ("[I]t does not matter that a [] claim was not expressly asserted in the [earlier action], 'for it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies.") (quoting *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir. 1977)). As this Court has previously noted, a plaintiff "cannot escape the operation of the doctrine of *res judicata* by inventing new legal labels or theories to place upon the same cause of action that has already been adjudicated." *Media Group, Inc. v. Tuppatsch*, 298 F. Supp. 2d 235, 245 (D. Conn. 2005). Mr. Chien has argued at various points that his former counsel is responsible for the omissions in his previous lawsuit and that he should not be punished for his former counsel's errors. Mr. Chien may have a claim against his prior counsel for malpractice, but that does not allow him to circumvent the doctrine of *res judicata*. *See generally* Restatement 2d of Judgments, §20 (outlining exceptions to *res judicata*, not including error of counsel). In our legal system, litigants choose their own counsel, and fairly or not, Mr. Chien must pay the price for any errors he says his counsel made.[4]

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[4] *Res judicata* would not apply to the claims that Mr. Chien ostensibly brings on behalf of his family members and Kin Yuet Li. These claims fail for other reasons that are explained below. Neither would *res judicata* bar

However, the Court has decided that it would be prudent to address Mr. Chien's claims, if only so that Mr. Chien will know that his claims would fail even if his claims were not barred by the doctrine of *res judicata*. The Court turns to them now.

II.

Court 1: Breach of Fiduciary Duty

In Court 1, Mr. Chien alleges that Defendants violated their fiduciary duties to the company's shareholders when they issued 323 million shares of Skystar stock to themselves in return for extinguishing their claims to unpaid compensation: according to Mr. Chien, this amounts to an "unjustified rich payment."[5] Mr. Chien's breach of fiduciary duty claim is derivative in nature–that is, it is a claim in which a shareholder must bring suit in the name of the corporation. It is not a claim that belongs to Mr. Chien individually.

As the Connecticut Supreme Court has explained:

> [I]ndividual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the

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his claims against Richardson & Patel, if the Court were to permit him to add Richardson & Patel as a party.

[5] For ease of discussion, the Court will refer to both Skystar Bio Pharmaceutical Co. and its predecessor corporation, CGPN, as "Skystar."

> corporation – to the shareholders collectively. In this regard, it is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding 'secondarily,' deriving his rights from the corporation which is alleged to have been wronged.

Yanow v. Teal Industries, Inc., 178 Conn. 262, 281 (1979) (citations omitted): *see also Fink v. Golenbock*, 238 Conn. 183, 200 (1996); *Halo Tech Holdings, Inc. v. Cooper*, No. 3:07-CV-489 (AHN), 2008 WL 4080081, at *3 (D. Conn. 2008) ("[A]n individual shareholder cannot pursue a [direct] cause of action [and recover individually] against third parties for wrong or injuries to a corporation in which he or she holds stock, even if the stockholder suffers a harm that flows from the injury to the corporation, such as a reduction in the value of his or her stock.").[6] Here, Mr. Chien seeks to recover damages for the loss of value to his stock caused by what he alleges was an improper issuance of stock to Defendants. He does not allege "a loss separate and distinct from that of the corporation" that would allow him to bring an individual claim. *See Yanow*, 178 Conn. at 282; *Guarnieri v. Guarnieri*, 104 Conn. App. 810, 819 (Conn. App. Ct. 2007); *see also In re Ionosphere Clubs*, 17 F.3d 600, 605 (2d Cir. 1994) ("[W]here a wrong has been committed by a third party against a corporation, shareholder intervention is necessary to cause the corporation to sue for rectification of the wrong. The classic case occurs where officers or directors of the corporation appropriate for themselves (or their friends) an opportunity of the corporation, or embezzle its funds."): *Primavera Familienstiftung v. Askin*, 130F. Supp. 2d 450, 494 (S.D.N.Y. 2001) ("A claim for corporate mismanagement is derivative because, where a corporation is mismanaged and therefore suffers an injury, with a resulting diminution in the value of the stock, the claim belongs to the corporation rather than the shareholders.")

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[6] Defendants appear to be operating under the assumption that Connecticut law applies to Mr. Chien's derivative claims, although they mention that Mr. Chien's derivative claims would also fail under the laws of Nevada, the state in which Skystar is incorporated. In determining standing, "courts differ on whether to apply the law of the state in which the suite is brought or the law of the state of incorporation." *Halo Tech Holdings*, 2008 WL 4080081, at * 3. Here, however, both Navada and Connecticut law bar Mr. Chien's derivative claims, and therefore, the Court need not perform a choice of law analysis. *See Leahy v. New Eng. Motor Freight, Inc.*, CV054010227S, 2008 WL4683908, at * 2 (Conn. Super. Ct. Oct. 3, 2008) ("The threshold choice of law issue in Connecticut, as it is elsewhere, is whether there is an outcome determinative conflict between applicable laws of the states with a potential interest in the case. If not, there is no need to perform a choice of law analysis, and the law common to the jurisdiction should be applied.").

It is difficult to understand why Mr. Chien believes he has a direct claim against Defendants for breach of fiduciary duty. He appears to argue that his voting rights as a shareholder of Skystar have been affected by Defendants' breach, and cites *Lipton v. News Int'l PLC*, a case in which the court held that a stockholder could bring a direct action if he alleges "a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation." 514 A.2d 1075, 1078 (Del. 1986). It is true that as a result of the issuance of shares to Defendants, Mr. Chien's voting power decreased because as a result of the issuance of shares, he owned a smaller percentage of the outstanding shares. But that is true of all of Skystar's shareholders; in that regard, Mr. Chien is not unique at all. More fundamentally, the wrong Mr. Chien alleges is not connected to his voting rights as a shareholder. He does not allege that he lost majority control of the company (nor could he) or that he was unable to prevent the reverse merger (which, by all accounts, he supported). Instead, Mr. Chien's sole complaint is that his stock lost value because of the issuance of shares to Defendants in connection with the reverse merger. This injury, if it occurred, is an injury to the corporation, not a special injury to Mr. Chien. And, in fact, Mr. Chien conceded as much in his original Complaint. *See Notice of Removal* [doc. # 1] Ex. A, ¶ 66 ("Defendants had and have fiduciary duties of loyalty, good faith and due care to the Company's property and *all shareholders' interests* ... Unfortunately, they violated all these.") (emphasis added).

Having concluded that Mr. Chien's breach of fiduciary duty claim is derivative in nature, the Court further concludes that Mr. Chien lacks standing to bring the claim. For "[o]nce a shareholder disposes of his shares, he loses standing to bring a derivative action." *Halo Tech Holdings*, 2008 WL4080081, at * 3; *see also Guarnieri*, 104 Conn. App. At 821 (holding that a shareholder who disposes of his shares loses standing to bring a derivative action; "[n]o longer a shareholder in the corporation, the defendant cannot maintain a derivative action on its behalf"); *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 19 (2003) ("[A] former shareholder has no standing to sue for breach of fiduciary duty on a derivative claim."). According to Mr. Chien, he sold all his shares of Skystar stock as of July 2008, a full six months before he filed this lawsuit in state court. *See* Compl. [doc. #1] at 39. He is, therefore, a former shareholder and does not have standing to pursue a derivative action.

Even if Mr. Chien were a current shareholder, the Court would not allow him to proceed with his derivative action. This is so because in order to bring a derivative action a plaintiff must be found to "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Conn. Gen. Stat. § 52-572j; *see also* Fed. R. Civ. Pro. 23.1(a); Nev. R. Civ. Pro. 23.1 ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."). The Court does not believe that Mr. Chien can fairly and adequately represent the interests of Skystar's shareholders for many reasons, chief among them that Mr. Chien is unrepresented and proceeding *pro se*; that he struggles with the English language; that he seems to lack even a basic understanding of the law; that he was previously sanctioned for bringing a frivolous lawsuit against these same Defendants; and that he has exhibited an animosity towards Defendants that is above and beyond what is generally expected during the normal course of litigation. *See Phillips v. Tobin*, 548 F.2d 408, 413-15 (2dCir. 1976) (holding that *pro se* litigant cannot act as representative in derivative suit and stating that "[w]e can find no reason or justification for permitting the corporation or the other shareholders to be subjected, involuntarily, to the risks of this plaintiff's transgressions, distractions and deficiencies as their advocate").

In his First Amended Complaint, Mr. Chien also attempts to assets claims on behalf of his wife and son, and on behalf of an individual named Kin Yuet Li. There is no legal basis for Mr. Chien to do so. Mr. Chien is not an attorney and cannot represent these individuals and, as explained above, he cannot bring a derivative claim on their behalf. *See United States ex rel. Mergent Servs. V. Flaherty*, 540 F.3d89, 92 (2d Cir. 2008) ("[A]n individual who is not licensed as an attorney `may not appear on another person's behalf in the other's cause.") (citing *Machadio v. Apfel*, 276 F 3d 103, 106(2dCir.2002). Moreover, it appears from the face of the original and First Amended Complaint that these individuals are also past, not current, shareholders, and thus would be unable to bring a derivative action, even if they did so on their own behalf. *See* Notice of Removal [doc. # 1] Ex. A ("Records of Purchases and Sales"); Am. Compl. [doc. # 22] ¶ 95.

At times, Mr. Chien speaks of *representing* his family members and Mr. Li. *See* Am. Compl. [doc. # 22] ¶ 3. Elsewhere, he indicates that Mr. Li has assigned his legal rights to Mr. Chien. *See id.* ¶ 2. Mr. Chien has attached to the First Amended Complaint a "Customer Agreement," in which Kin Yuet Li assigns his legal rights to USChina Channel LLC, a corporation which is apparently owned by Mr. Chien. It is not entirely clear whether Mr. Chien is attempting to represent Mr. Li or whether he contends that Mr. Li has assigned his legal rights to

Mr. Chien. However, assigning Mr. Li's legal rights to USChina Channel LLC is not equivalent to assigning his legal rights to Mr. Chien himself. Mr. Chien is separate from any corporation he may own and as a *pro se* litigant, he may not represent USChina Channel LLC anymore than he can represent Mr. Li. *See Lattanzio v. COMTA*, 481 F.3d 137, 139 (2d Cir. Conn. 2007) ("[A] sole member limited liability company must be represented by counsel to appear in federal court."). Moreover, he cannot circumvent this rule by having USChina Channel LLC assign its legal rights to Mr. Chien. *See Jones v. Niagara Frontier Transp. Authority*, 722 F.2d 20, 23 (2d Cir. 1983) (holding that corporation could not assign rights to *pro se* litigant to circumvent rule that corporation must be represented by licensed attorney).[7]

Finally, Mr. Chien's breach of fiduciary duty claim is time barred. In Connecticut, "[b]reach of fiduciary duty is a tort action governed by the three year statute of limitations." *Ahern v. Kappalumakkel*, 97 Conn. App. 189, 192 (Conn. App. Ct. 2006); see *also* Conn. Gen. Stat. § 52-577.[8] Mr. Chien alleges that Defendants breached their fiduciary duty in connection with the issuance of shares to Defendants and the reverse merger, which was completed in

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[7] Even if Mr. Li had properly assigned his legal rights to Mr. Chien, the claims would fail for the same reasons that Mr. Chien's own claims fail; most of the claims are derivative in nature and the Court does not believe Skystar's shareholders would be adequately represented by Mr. Chien, Mr. Li appears to be a former shareholder and thus lacks standing, most of the claims are barred by the statute of limitations, and many of the claims fail on the merits.

[8] For rights that existed at common law, courts apply the statute of limitations of the forum state. *See Baxter v. Sturm, Ruger & Co.*, 230 Conn. 335, 347 (1994).

November 2005. Mr. Chien filed his suit in January 2009, more than three years after the alleged breach occurred.[9]

Mr. Chien argues that Defendants fraudulently concealed their breach of fiduciary duty and, therefore, that his claim for breach of fiduciary duty is timely. *See* Conn. Gen. Stat. § 52-595 ("If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefore at the time when the person entitled to sue thereon first discovers its existence."). Mr. Chien bears the burden of pleading sufficient facts showing that the statute of limitations period should be tolled. *See In re Publ'n Paper Antitrust Litig.*, No. 304M D1631SRU, 2005 WL 2175139, at *3 (D. Conn.2005). Moreover, a claim of fraudulent concealment must meet the heightened pleading standard of Rule 9(b) of the *Federal Rules of Civil Procedure. See OBG Tech. Servs. V. Northrop Grumman Space & Mission Sys. Corp.*, 503 F. Supp. 2d 490, 504 (D. Conn. 2007).

Although Mr. Chien alleges many fraudulent statements made by Defendants from 2005 to present, he never states precisely what information he lacked in November 2005 that made it impossible to bring his claim or which of Defendants' statements fraudulently concealed that information from him.

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[9] Mr. Chien claims that he filed his lawsuit on December 29, 2008. The Connecticut judicial website lists his lawsuit as having been filed on January 13, 2009. *See* Request for Judicial Notice [doc. # 14] Ex. 3. In either case, more than three years passed between the reverse merger in November 2005 and the filing of this lawsuit.

Nor does he explain when and how he came to possess what he claims was previously-concealed information. Since, according to Mr. Chien, Defendants are still fraudulently concealing information from him, he must have received the information from an independent source. Yet Mr. Chien fails to disclose when he became aware of his cause of action and how he obtained that information. Mr. Chien's allegations of fraudulent concealment simply do not meet the heightened pleading requirement of Rule 9(b). *See Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004) (Under Rule 9(b), a plaintiff must "explain why the statements were fraudulent.").

As the Court has previously explained, all of the facts relevant to Mr. Chien's breach of fiduciary duty claim were disclosed to the public, at the very latest, by November 14, 2005, more than three years before Mr. Chien filed suit. In fact, internet postings by Mr. Chien indicate that Mr. Chien himself was aware that Defendants would receive stock in exchange for unpaid debt the company owed them. *See Chien v. Skystar Bio Pharmaceutical Co.*, 03:07-cv-781 (MRK), Ruling and Order [doc. # 106]. These posting – which directly contradicted the allegations in his complaint-formed part of the basis for sanctioning Mr. Chien in the previous case.

Indeed, Mr. Chien comes close to admitting that all of the relevant information was available to the public as of November 2005. In the First Amended Complaint, he states that "[t]he real story is that when November 11, 2005's 8K filed, 95% of shareholders didn't read 8k and didn't know the issuance of 323 millions of new shares until they received copies of Form DEF 14C at the end of January 2006." Am. Compl. [doc. #22] ¶ 28. That may be true, but Defendants cannot be said to have fraudulently concealed Mr. Chien's cause of action on account of the fact that Mr. Chien did not read Defendants' public disclosures. Fraudulent concealment requires the plaintiff to show that "it would have been impossible for a reasonably prudent person to learn about his or her cause of action." *Rogers v. Apicella*, 606 F. Supp. 2d272, 283 (D. Conn. 2009) (citing *Pearl v. City of Long Beach*, 296 F.3d 76, 85 (2d Cir. 2002)). A reasonably prudent person would have read the public disclosures provided by the company and would have become aware of the issuance of stock to Defendants.

In sum, Mr. Chien lacks standing to bring a claim for breach of fiduciary duty and in any event, is not an appropriate representative for a derivative suit even if he did have standing. In addition, his claim is time barred. Accordingly, the Court grants Defendants' Motion to Dismiss Count 1 of the First Amended Complaint.

Count 2: Connecticut Unfair Trade Practices Act (CUTPA)

Mr. Chien also brings a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a, *et seq.*, relying on much the same allegations made in relation to his breach of fiduciary duty claim. For similar reasons, Mr. Chien's CUTPA claim is also derivative in nature. The injury he alleges is an injury to all shareholders- that is, Defendants were unjustly enriched as a result of the fraudulent issuance of stock in connection with the reverse merger in November 2005. If true, the Defendants' actions would affect the price of all shareholders' stock, not just Mr. Chien's.

In an attempt to present his claim under CUTPA as a direct and individual claim, Mr. Chien mentions that a security is an investment contract and that he had voting rights as a shareholder. These facts are correct, but irrelevant. Otherwise, every derivative claim could be disguised as a direct claim merely by mentioning that the plaintiff has certain rights as a shareholder. As explained above, it is the nature of the injury that determines whether the claim is a direct or a derivative claim. Here, the injury is to the corporation; it is not a special injury inflicted on Mr. Chien. *See Halo Tech Holdings*, 2008 WL 4080081, at * 2 (dismissing CUTPA claim against corporation because plaintiff was not a current shareholder). As noted previously, as a former shareholder, Mr. Chien lacks standing to bring a derivative claim, and he would not be an appropriate representative even if he were a current shareholder. Nor, as explained above, can he bring either a direct or derivative claim on behalf of his family members or Kin Yuet Li.

Moreover, Mr. Chien's claim is barred by CUTPA's three-year statute of limitations. *See* Conn. Gen. Stat. § 42-110g. Again, all of the facts relevant to Mr. Chien's CUTPA claim were disclosed to the public, at the very latest, by November 14, 2005. Although Mr. Chien references various other "deceptive actions" that occurred in 2007 and 2008, these actions all appear to relate to what Mr. Chien believes was a massive cover up of the alleged fraud perpetrated in 2005. Under Conn. Gen. Stat. § 52-595, even if there were fraudulent concealment of some sort, the statute of limitations is only tolled until "[t]he date the plaintiff first discovers an injury." *Byrne v. Burke*, 112 Conn. App. 262, 272(Conn. App. Ct. 2009). Any actions undertaken by Defendants after Mr. Chien had knowledge of the elements of his claim are irrelevant to the question of equitable tolling.

Finally, "CUTPA does not apply to deceptive practices in the purchase and sale of securities" or indeed any area over which the Securities and Exchange Commission would have jurisdiction. *Russell v. Dean Witter Reynolds, Inc.*, 200 Conn. 172, 180(1986); *see also Olsavsky v. Casey*, No. 5-92-324 (WWE), 1992 WL363573, at * 4 (D.Conn. Nov. 2, 1992). The gravamen of Mr. Chien's complaint is that he was induced into purchasing Skystar stock due to the fraudulent misrepresentations and omissions of Defendants. These allegations are outside the scope of CUPTA. *See also Taurus Advisory Group v. Sector Mgmt.*, CV960150830, 1997 WL 241153, at *3 (Conn. Super. Ct. May 6, 1997) ("CUTPA does not apply to the internal business affairs and workings of partnerships, intracompany disputes among shareholders, disputes between officers and shareholders, or to participants in a joint venture.").

In sum, Mr. Chien lacks standing to bring a derivative claim under CUPTA and is not an appropriate representative even if he did have standing. In addition, the complaint fails to state a claim and is time barred. Accordingly, the Court grants Defendants' Motion to Dismiss Count 2 of the First Amended Complaint.

Count 3: Connecticut Uniform Fraudulent Transfer Act (CUFTA)

In this count, Mr. Chien alleges that Defendants violated the Connecticut Uniform Fraudulent Transfer Act (CUFTA) when they transferred newly-issued stock to Defendants in connection with the November 2005 reverse merger. In order to have standing to bring a claim under CUFTA, Mr. Chien must have been a creditor at the time the alleged fraudulent transfer took place. *See* Conn Gen. Stat. § 52-552e(a) ("A transfer made or obligation incurred by a debtor is fraudulent as to a creditor [only if] the creditor's claim arose before the transfer was made or the obligation was incurred."); *Schultz v. Direct Mail Servs.*, No. CV 305653, 1996 WL 63011, at * 2 (Conn. Super. Ct. Feb. 1, 1996) ("[T]he plaintiff has failed to establish he was a 'creditor' within the meaning of General Statutes § 52-552b(4) because he has not established that he had a 'right to payment,' pursuant to General Statutes § 52-552b(3), before the transfer occurred.").[10] Mr. Chien does not allege that he was a creditor of Skystar or Defendants at the time the alleged fraudulent transfer took place. Rather, he was a shareholder, a partial owner of Skystar.[11]

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[10] A "creditor" is defined in CUFTA as "a person who has a claim." Conn Gen. Stat § 52-552b(4). A "claim" in turn is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." *See id.* § 52-552b(3).

[11] Moreover, as with Mr. Chien's other claims, his claim under CUFTA is also derivative in nature and therefore, he lacks standing to pursue it. It

Therefore, Mr. Chien lacks standing to bring a claim under CUFTA. Accordingly, the court grants Defendants' Motion to Dismiss Count 3 of the First Amended Complaint.

Count 4: Forgery

It is difficult to discern precisely what forgery Mr. Chien believes occurred. However, it appears that he believes that the alleged fraudulent statements and misrepresentations in Skystar's SEC filings and press releases amount to forgery.[12] Forgery is a particular subspecies of fraud. In other words, all forgeries must meet the requirements of fraud, but not all frauds are forgeries. A person commits forgery when:

> he makes or draws a complete written instrument in its entirety, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker or drawer, but which is not such either because the ostensible maker or drawer is fictitious or because, if real, he did not authorize the making or drawing thereof.

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is clear that the alleged fraudulent transfers caused an injury to the corporation, not to Mr. Chien individually.

[12] Defendants argue that there is no civil cause of action for forgery under Connecticut law, but Defendants are incorrect. *See* Conn. Gen. Stat. § 52-565 ("Any person who falsely makes, alters, forges or counterfeits any document or knowingly utters, as true, any document falsely made, altered, forged or counterfeited, shall pay double damages to any party injured thereby.").

Conn. Gen. Stat. § 53a-137; *see also* Conn. Gen. Stat. § § 53a-140 ("A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument, or issues or possesses any written instrument which he knows to be forged."); *see also Benvenuti Oil Co. v. Foss Consultants, Inc.*, No. 01559862, 2003 WL 21977974, at * 16 (Conn. Super. Ct. Aug. 1, 2003).

Forgery requires that the fraud relate to the drafter of the document, not to the factual contentions contained therein. The quintessential example is a forged check. It is a forgery because the ostensible signer of the check did not authorize the signing. *See also* Black's Law Dictionary, 661 (defining forgery as "[a] false or altered document made to look genuine by someone with the intent to deceive"). Here, Mr. Chien does not allege that Defendants created documents that purported to come from fictitious individuals or from real individuals that did not authorize them. The tort of forgery is simply not applicable to the facts alleged in Mr. Chien's complaint.

Therefore, the Court grants Defendants' Motion to Dismiss on count 4 of the First Amended Complaint.

Count 5: Civil Theft

Mr. Chien's allegations of civil theft, *see* Conn. Gen. Stat. § 53a-137, are the same as those made in relation to his other causes of action, namely, that Defendants wrongly appropriated new shares of Skystar's stock in connection with the reverse merger. *See* Am. Compl. [doc. #22]¶¶ 112-13. Mr. Chien does not allege that Defendants stole from him *personally*. Rather, he alleges that Defendants stole from the corporation, which in turn decreased the value of his stock. This is a derivative claim, and as previously noted, Mr. Chien lacks standing to bring it. Moreover, civil theft is governed by the three-year statute of limitations for tort actions. *See Certain Underwriters at Lloyd's, London v. Cooperman*, 289 Conn. 383, 408 (2008); Conn. Gen. Stat. § 52-577. The alleged theft occurred in November 2005, more than three years before Mr. Chien filed suit and, as explained above, Mr. Chien cannot avail himself of the equitable tolling provision found in Conn. Gen. Stat. § 52-595 because he was aware of all of the facts relevant to his civil theft claim in November 2005.

Therefore, the Court grants Defendants' Motion to Dismiss Count 5 of the First Amended Complaint.

Count 6: Conspiracy

In this count, Mr. Chien alleges that Defendants conspired to fraudulently obtain Skystar stock in exchange for what Mr. Chien believes was fabricated unpaid compensation. As the Connecticut Supreme Court has stated:

> There is no independent claim of civil conspiracy. Rather, the action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself.... Thus, to state a cause of action, a claim of civil conspiracy must be joined with an allegation of a substantive tort.

Larobina v. McDonald, 274 Conn. 394, 408 (2005). Mr. Chien has not adequately plead any substantive tort; therefore, his conspiracy claim fails as well.

Moreover, the conspiracy claim independently fails for much the same reasons as his other claims. "A civil conspiracy action is governed by a three year statute of limitation pursuant to § 52-577." *Carlson v. Smith*, No. CV 960055299S, 1999 WL 989601, at * 5 (Conn. Super. Oct. 19, 1999). Mr. Chien appears to allege that the conspiracy began as early as 2003, but there is no doubt that it ended in November 2005, with the completion of the reverse merger. More than three years passed between the end of the conspiracy and the filing of Mr. Chien's lawsuit. It is therefore time-barred. Finally, his conspiracy claim, like his other claims, are derivative in nature and Mr. Chien lacks standing to bring a derivative claim.

Therefore, the Court grants Defendants' Motion to Dismiss Count 6 of the First Amended Complaint.

Counts 7 and 8: Securities Fraud

Although Mr. Chien's original Complaint alleged eleven separate causes of action relating to securities fraud, his First Amended Complaint asserts only two claims: a violation of § 10(a) of the Securities Exchange Act and a violation of § 20(a) of the Securities Exchange Act. Moreover, he acknowledges that his own securities fraud claims are on appeal and, therefore, Mr. Chien asserts these two securities fraud claims on behalf of Kin Yuet Li only. *See* First Amended Complaint ¶ 118 ("These securities fraud claims coincided with the standard of the Private

Securities Litigation Act [sic] ("PSLRA"). Because Chien's portion of the invest loss claims are in the appealing process, we are not to repeat here. However, Kin Yuct Li's portion of the invest loss is still being claimed here.") As the Court explained above, Mr. Chien is not permitted to represent Mr. Li in this lawsuit. He is not a lawyer and has no other relationship with Mr. Li that would allow him to serve in a representative capacity. Moreover, any claim arising from the November 2005 reverse merger would be barred by the two-year statute of limitations for securities fraud actions. *See Shah v. Meeker*, 435 F.3d 244, 248-249 (2d Cir. 2006).

Therefore, the Court grants Defendants' Motion to Dismiss Counts 7 and 8 of the First Amended Complaint.

III.

In sum, the Court GRANTS Defendants' Motion to Dismiss For Failure to State a Claim [doc. # 12]. Therefore, Defendants' Motion to Dismiss for Lack of Personal Jurisdiction [doc. # 13] is DENIED without prejudice as moot. Defendants' Request for Judicial Notice [doc. # 14] is GRANTED in part and DENIED in part without prejudice to renewal. The request is granted with respect to exhibits 1-3 insofar as the Court relied on its previous rulings in Mr. Chien's first lawsuit, *Chien v. Skystar Bio Pharmaceutical Co.*, No. 03:07-cv-781. The request is denied with respect to exhibit 4, as the court did not rely upon that exhibit in this ruling. Mr. Chien's second Motion for Leave to Amend [doc. # 30] is DENIED as untimely, made without good cause and as futile.

Defendants shall file any motion for sanctions by July 17, 2009.

The Clerk is directed to enter judgment in favor of the Defendants, and close this file.

IT IS SO ORDERED

/S/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: June 8, 2009.

UNITED STATES DISTRICTCOURT
DISTRICT OF CONNECICUT

Andrew Chien)
Plaintiff) No. 3:09CV149
v.) (MRK)
SKYSTAR BIO)
PHARMACEUTICAL)
Co. et al.)
Defendants)

RULING AND ORDER

On June 8, 2009, the Court granted Defendant: Motion to Dismiss and dismissed this action entirely. See Ruling and Order [doc # 31]. Thereafter, Defendants filed a Motion for Sanctions [doc. #36] against Mr, Chien under Rule 11 of the *Federal Rule of Civil Procedure* and the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(c) Mr. Chien responded Defendants' sanctions motion with a Motion to Dismiss Defendants' Motion for Sanctions [doc. # 43] and also filed his own Motion for Sanctions [doc. # 41]. Mr. Chien has also filed a Motion for Enlargement of Time to Submit Affidavit [doc. #45]. For the reasons that follow, Defendants Motion for Sanctions [doc. #36] is GRANTED in part and DENIED in part. Mr. Chien's Motion to Dismiss Defendants' Motion for Sanction [doc. #43] his own Motion for Sanction [doc.#41], and his Motion for Enlargement of Time to Submit Affidavit [doc. #45] are DIENIED.

This is far from the first occasion that the Court has had to address the dispute between Mr. Chien and the Defendants. As the facts and law have been set out at length previously, that is no need to reiterate them here, and the Court assumes familiarity with its prior rulings. *See Chien v. Skystar Bio Pharmaceutical Co.*, 566 F. Supp.2d 108 (D. Conn. 2008) (dismissing the previous, action 03:07.cv.781, arising from the same events): *Chien* v *Skystar Bio Pharmaceutical Co.*, 256 F.R.D. 67 (D. Conn. 2009)(granting sanctions in the previous action 03:07-cv-781); Ruling and Order [doc.#31], _ F, Rupp.2d__, 2009 WL 1606451 (D. Conn. June 8, 2009)(dismissing the current action). It is sufficient briefly to recount the procedural history.

Mr. Chien represented by counsel originally filed suit against these same Defendants in May 2007, alleging violation of §§10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§78j(b), 78t(a), and SEC Rule 10b-5, 17C.F.R. §240.10b-5. *See Chien v. Skystar Bio Pharmaceutical Co.* 03:07.cv.781 (MRK), After giving Mr. Chien an opportunity to amend his complaint in that first action, the Court dismissed the case in its entirely in July 2008, holding that Mc Chien had failed to plead fraud and loss causation. Shortly before the Court dismissed the case, but after briefing and oral argument on the motion to dismiss, Mr, Chien's counsel withdrew his appearance on behalf of Mr. Chien, and Mr. Chien proceeded thereafter as *pro se*. Defendants then filed a motion for sanctions under PSLRA, which provides for mandatory sanction, under Rule 11 for frivolous securities action. The Court awarded partially sanction against Mr. Chien and his former counsel in

February 2009. Mr. Chien appealed both the Court's decision dismissing the complaint and the Court's sanctions order. *See Chien v. Skystar Bio Pharmaceutical Co.* 03:07.cv.781 (MRK), Notices of Appeal [docs. #77,118].

Meanwhile, in January 2009, Mr. Chien - still proceeding *pro se* - filed a second action against the same Defendants in state court. Defendants promptly removed the state-court action to federal court and the case was assigned to the undersigned. *See* Notice of Removal [doc. #1]. Defendants then filed their Motions to Dismiss [docs. #13.14] and Request for Judicial Notice [doc. #15]. The Court permitted Mr. Chien to amend his complaint once, and Mr. Chien unsuccessfully sought to amend his complaint a second time to sue the lawyers representing the Defendants. Although Mr. Chien alleged many new causes of action in his second case, his newly-asserted claims come from the same events, and included the same parties as his previous lawsuit. The Court thus concluded that Mr. Chien second lawsuit barred by the doctrine of *res judicata*. See Ruling and Order [doc. #31]. Nevertheless, the Court also proceeded to address the merits of each of Mr. Chien's claims, and concluded that they should fail for a variety of reasons even if they were not precluded. *See id.*

The legal standard for sanctions under the PSLRA and Role 11 was discussed by the Court at length in its prior ruling on this issue. And the Court will not repeat that discussion in this opinion, *See Chien*, 256 F.R.D. at 71-75. Suffice it to say that the Court applies the same standard here. The only questions that need to be decided on the current motion are whether the claims raised by Mr. Chien in this second lawsuit were frivolous under Rule 11(b)(2), and whether the fact Set that Mr. Chien is proceeding pro *se* alters the analysis under Rule 11 and the PSLRA.

For a claim to violate Rule 11(b) (2), a pleading "must be or border on the frivolous" *Healey v. Chelsea Res., Ltd*, 947 F .2d 611. 626 (2d Cir. 1991) (citing *Aid Auto Stores, Inc v. Cannon*. 525 F.2d 468. 471(2d Cir. 1975)); see *also id.* ('Rule 11 targets situations where it is patently clear that a claim has absolutely no chance of success.") (quotation marks and citation omitted); *Gurary v. Nu-Tech Bio. Med. Inc.*, 303 F. 3d.212.224 (2d Cir. 2002) (using frivolousness as the relevant standard under Rule 11(b)(2)). The standard for triggering the award of fees under Rule 11(b) (2) is "objective unreasonableness." *Margo v. Weiss*. 213 F.3d 55,65 (2d Cir. 2000): see also *Calloway v, Marvel. Entm't Group*. 854 F.2d 1452, 1470 (2d. Cir 1988); *Storey v. Cdlo, Holdings, L. L. C.* 183 F. Supp. 2d 355, 365 (S.D.N.V. 2002). There is no 'empty-head pure-heart' justification for patently (frivolous arguments" under Rule 11. *See Simon DeBartolo Group. L.P. v. Richard E. Jacobs Group. Inc*. I86 F, 3d 157, 166 (2d Cir. 1999). The subjective intent of the filer is irrelevant See *Knipe v. Ski Skinner,* 19 F.3d 72. 75 (2d. Cir. 1994). "Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith... provides [no] safe harbor." *Id.* (quotation marks and citation omitted).

The Court has little trouble determining that Mr. Chien's complaint in this case was frivolous. Mr. Chien's claims arose from the same events and included the same parties as similar claims already dismissed on their merits by this Court in the previous action. Mr. Chien merely sought to embellish or add new labels to his previous cause of action. Furthermore as discussed at length in the ruling on the notion to dismiss, his new claims were also barred by relevant statutes of limitations or were not cognizable as a matter of law. The Court has no doubt. Therefore, that Mr. Chien's claims had absolutely no chance success and were objectively unreasonable.

However, a determination of frivolousness does not end the inquiry. In general, where a party is represented by counsel, sanctions for the legal insufficiency or frivolousness of a pleading run against the attorney alone. *See* Fed. R. Civ. Pro. 11(c) (5) ("The court must not impose a monetary sanction: (A) against a represented party for violating Rule 11(b) (2)."), see *also Byrne r Nezhat*, 261 F. 3d 1075, 1118 (11th Cir. 2001) ("Rule 11 does not permit sanctioning a client, however, when the basis for the sanction is that the pleading was legally frivolous"): *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 57 (2d Cir. 2000) ("The district court also cannot order sanctions violation of Rule 11(b) (2) against a represented party."). Here, Mr. Chien is preceding *pro se*. Nevertheless, Defendants argue that *pro se* litigants are also subject to Rule 11 sanctions. *See* Memorandum of Law in Supp. of Defs "Mot for Sanctions [doc. #38] ("Defs.' Memo") at 10.

The Court agrees with Defendants and concludes that Rule 11 sanctions should be imposed on Mr. Chien as a pro se litigant, The plain language of Rule 11 only prohibits sanctions under Rule 11 (b)(2) against a *represented* party. *See* Fed. R. Civ. Pro. 11(c)(5). Accordingly, courts in the Second Circuit have recognized the availability of Rule 11 sanctions against pro se litigants. As the Second Circuit stated in *Maduakolam v. Columbia Univ.*, 866 F.2d 53 (2d

Cir. 1989), Rule 11 applies both to represented and *pro se* litigants." *id* at 56; *say also, e.g., Baasch v. Rever*, 827 F. Supp. 940. 944 (E.D.N.Y. 1993) (imposing sanction against a pro se party); *Colida v. Nokia, Inc.*, No, 07 Civ. 8056 (KMW) (HBP), 2008 WL 4517188, at *11-*12(S.D.N.Y. May 6, 2008) (same); *Malley v. New York City Bd.* of *Educ.*, 207 F. Supp. 2d 256, 259 (S.D.N.Y.2002) ("The fact that a litigant appears *pro se* does not shield him from Rule 11 sanctions because one acting *pro se* has no, license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.") (Internal quotation marks and citation omitted).

However, a court should not lightly impose sanctions *on a pro se* litigants for ordinarily, *pro se* parties are held to much more lenient standard than attorneys. Therefore, in determining whether to impose sanctions on a party preceding *pro* se, "the court may consider special circumstance of litigants, who are untutored in the law." *Maduakolam*, 866 F.2d at 56: *also* Horton *v. Trans World Airlines Corp,.* 169 F.R,D. 11,16(E.D.N.Y.1996) ("Although Rule 11 applies to pro se litigants, *pro se* litigants are held to a more lenient standard than professional counsel, with Rule 11's application determined on a sliding scale according to the litigant's level of sophistication."). In general, courts have been more willing to sanction *a* prove litigant where he or she has more familiarity or competence with the law, (or has been put on notice as to the possibility of sanctions. *See Baasch*, 827 F. Supp. at 944 (imposing sanctions where *pro se*, plaintiff had "shown some competence in biding and understanding the law," the court had explained to plaintiff why his claims had failed and made him "fully aware of the legal and factual requirements of his claims," and had also warned plaintiff about possible sanctions, and plaintiff had nonetheless filed a motion for *a* new trial); *Smith n Education People, Inc.*, 233 F R.D.137, 142-43 (S.D.N.Y.2005) (imposing sanction where pro se litigants have shown great energy and self-professed sophistication" in the relevant law and were familiar with Rule 11 sanctions); *Colido.*2008 WL 4517188, at *12(imposing sanctions where *pro se* had been warned about sanctions and had previously been involved in "a case remarkably similar to the instant one").

Based on these legal principles, Mr. Chien is a textbook example of *a pro so* litigant against whom sanctions are appropriate. Given the previous litigation on this matter, Mr. Chien was familiar with the law and had already been informed that his claims were frivolous. More importantly, he was intimately familiar with the possibility of sanctions, having been subject to them already. Furthermore, Defendants specially put Mr. Chien on notice that they would seek sanctions if he pursued the second action and it was ultimately dismissed. *See* Def's.' Memo [doc. #38] at 2. "Where, as here, a Court dearly places *a pro se* litigant on notice that his or her practice is sanctionable, the *pro* se litigant cannot he heard to complain that sanctions ought not be imposed because he or she is *pro se*. Such a result is unfair to the *pro se litigant's adversary.*" *Baasch*, 827 F. Supp. 944.

The only remaining issue decided is the amount of sanction. Again, the legal standard has been previously set out by this Court in an action involving those parties, and thus it will not be reiterated here.

See Chien, 256 F R.D. at 76-78. Under the PSLRA, the presumption is that the appropriate sanction is full attorney's fees and expenses. *See* 15 U.S.C. § 78u-4(c)(3)(A)(ii). This presumption may be rebutted by a showing that "the award attorneys' fees and other expenses will impose an unreasonable burden on [the sanctioned] party or attorney and would be unjust, and the failure to mate such an award would not impose a greater burden on the party in whose favor sanction are to be imposed" 15 U.S.C 78u-4(c)(3)(B)(i).

When the Court previously imposed sanction on Mr. Chien the Court determined the reasonable attorneys' fees and expenses, then discounted than amount by half to account for the unreasonable burden on Mr. Chien and his then-attorney. *See* Chie*n*. 256 F.R.D.at 77-78. The Court rated that it was "comfortable that their [a sanction of $8,562.50] adequately punished the violation and will deter future frivolous law suit by ... Mr. Chien." *Id*. Defendants now urge the Court to impose the full amount of attorneys' fees and expenses, reasoning that the previous sanctions failed to deter Mr. Chien. Def.'s Memo [doc. #38] at 14.[1] Defendants' calculate their fees and expense, as $35,176.52, ($ 34,089.5 in attorneys' fees and $1078.12 in expenses), See Decl. of Timothy M. Herring in Supp. of Mot., for Sanction [doc. #37] ("Herring Decl.") ¶5; Supplemental Decl of Jody Borrelli Decl. [doc.# 40] Ex. A) and considered their hourly rates, the Court finds the amounts sought are reasonable. In particular, the court finds that the hourly rate for the lawyers and personnel involved are reasonable and customary, and that the time devoted to this second action was also reasonable, particularly given the changing nature of the action following Mr. Chien's motions to amend. The Court also finds that the costs sought are reasonable. However, in his Memorandum in Support of his Motion to Dismiss defendants' Motions for Sanctions [doc. # 44]. Mr. Chien claims that he does not have the ability to pay sanctions, as his business has been hurt by the financial crisis and he is currently paying education expenses for his two children. The Court is sympathetic to Mr. Chien's plight, but he has also inflicted substantial costs on Defendants. The Court concludes that full award of attorneys' fees and expenses would constitute an "unreasonable burden" on Mr. Chien, and further concludes that awarding only partial attorneys' fees and expenses would not impose a greater burden on Defendants. Therefore, the Court awards attorneys' fees of $10,000 and costs of $2000, for a total sanction of $12,000 against Mr. Chien for his Rule 11 violations in this case. By increasing the sanction amount, the Court hopes that it will deter Mr. Chien from filing any further frivolous actions against these Defendants. This is the second time that the Court has been lenient towards Mr. Chien in determining a sanction amount. Mr. Chien should not expect such lenient a third time.

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[1] Mr. Chien has not paid the sanctions ordered by the Court. Defendants urge the Court to issue a new order again requiring payment of the sanctions. The Court sees no reason to do so. The Court's previous sanctions order stands, Mr.Chien has appealed both that order as well as the Court's ruling dismissing this case. However, the Court takes the opportunity to alert Mr. Chien to Rule 16(g)(2) of the District's Local Rules, which provides as follows: "The Clerk shall not accept for filing any paper from an attorney or pro se litigant against whom a final order of monetary sanction has been imposed until the sanction has been paid in full. Pending payment, such attorney or pro se litigant also may be barred from appearing in court. An order imposing monetary sanctions becomes final for purposes of this local rule when the Court of Appeals issues its mandate or the time for filing an appeal expires.

In conclusion, the Court GRANTS in part and DENIES in part Defendants' Motion for Sanctions [doc. # 36], and DENIES Mr. Chien Motion to Dismiss Defendants 'Motion for Sanctions [doc. # 43]. As there is no basis in law or fact for Mr. Chien's Motion for Sanctions [doc. # 41] that motion is also DENIED. Finally, Mr.Chien's Motion for Enlargement of Time to Submit Affidavit [doc. # 45] is DENIED as moot given the Court's ruling on the merits.

IT IS SO ORDERED

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: August 12, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECICUT

Andrew Chien)
Plaintiff) No. 3:07CV781
v.) (MRK)
SKYSTAR BIO)
PHARMACEUTICAL)
Co. et al.)
Defendants)

RULING AND ORDER

In this action, Plaintiff Andrew Chien sues Defendants Skystar Bio Pharmaceutical Company ("Skystar"), Scott Cramer, Steve Lowe and David Wassung (collectively, the "Defendants") for securities fraud in connection with a 2005 reverse merger between Cyber Group Network Corporation ("CGPN") and Skystar. Defendants have moved to dismiss Mr. Chien's Amended Complaint [doc. # 35] on the basis of Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Act of 1995, 15 U.S.C. § 78u-4 ("PSLRA"). *See* Defendants' Motion to Dismiss Amended Complaint [doc. # 39]. Because Mr. Chien has failed adequately to allege either fraud or loss causation, the Court grants Defendants' motion and dismisses this case.

I.

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court "must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Gorman v. Consol. Edison Corp.*, 488 F .3d 586, 591-92 (2d Cir. 2007) (citing *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002)). Furthermore, on a Rule 12(b)(6) motion, "[a] complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint." *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (citations and quotations omitted). A document is integral to the complaint "where the complaint relies heavily upon its terms and effect...." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (quotations omitted); *see Collier v. Aksys, Ltd.*, No. 3:04cv 1232(MRK), 2005 WL 1949868, at * 1 (D. Conn. Aug. 15, 2005). As the Second Circuit stated in *Chambers*, "a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Id.* (emphasis in original): *see also Beary v. ING Life Ins. And Annuity Co.*, 520 F. Supp.2d 356, 359 (D. Conn. 2007). Finally, and as is relevant to the present case, a court considering a motion to dismiss may look at public stock prices as well as "public disclosure documents required by law to be, and that have been, filed with the [Securities and Exchange Commission ("SEC")]." *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (citations omitted); *see also Blue Tree Hotels Inv. (Canada), Ltd. V. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F. 3d212, 217 (2d Cir. 2004) (A court "may also look to public records --- in deciding a motion to dismiss."); *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 128 (D. Conn. 2007).

At oral argument, the parties agreed that on the Motion to Dismiss the Court could take judicial notice of stock quotations and disclosure documents filed with the SEC, without transforming Defendants' Motion to Dismiss into a Motion for Summary Judgment. *See* Request for Judicial Notice [doc. # 25]. Accordingly, the following facts are taken from the Amended Complaint, SEC disclosure documents, and stock quotations.

A.

On September 20, 2005, CGPN issued a press release announcing that it had entered into an agreement to acquire Skystar in a reverse merger through the issuance of common stock.[13] Four business days later, on September 26, 2005, CGPN timely filed a Form 8-K with the SEC, which attached the full text of the Share Exchange Agreement between CGPN and Skystar. Among other things, the Share Exchange Agreement stated that at the closing, CGPN's authorized and issued common stock would total 500,000,000 shares and that CGPN would have no material liabilities. The Share Exchange Agreement also stated that as of the date of the closing, Messrs. Cramer, Lowe and Wassung would "hold an amount of shares of CGPN common stock which represents at least a majority of the issued and outstanding capital stock of CGPN." *See* Request for Judicial Notice [doc. # 25], Ex. A, §§ 4.2, 4.9, 7.1(b).

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[13] Mr. Chien did not mention the September 20 Press Release in his Amended Complaint. He first brought it to the Court's attention in his sur-reply, along with many other additional facts not found in the Amended Complaint. *See* Plaintiff's Sur-Reply to Defendants' Reply to Plaintiff's Mem. In Opposition to Mot. To Dismiss [doc. # 56] at 1. The Court does not rest its decision on the September 20 Press Release, but merely cites it here in order to provide a complete account of the facts.

Before the closing of the merger, CGPN had only 177,188,665 shares of common stock issued and outstanding (though its authorized shares of common stock totaled 500,000,000). *See* Amended Compl. [doc. # 35] at 9-10, ¶ 13. The company had assets of only $1,137 and liabilities of over $1.5 million, approximately $1 million of which was owed to Messrs. Cramer, Lowe and Wassung, the company's officers. CGPN Form 10Q, Dec. 1, 2005, at 2, *available at* http://www.sec.gov/Archives/edgar/data/1076939/00011442040503 8556/v030582_10qsb.htm.[13.1]

The closing of the reverse merger occurred on November 7, 2005, at which time CGPN issued approximately 316,461,335 shares of common stock to Messrs. Cramer, Lowe and Wassung, in payment of the debts owed those individuals. CGPN timely filed a Form 8-K dated November 14, 2005 that disclosed that the merger had taken place and also set forth the precise number of shares of common stock issued to Messrs. Cramer, Lowe and Wassung in return for cancellation of debt owed those individuals. See Request for Judicial Notice [doc. # 25], Ex. B at 30. As a result of the issuance of these shares, Messrs. Cramer, Lowe and Wassung held 72% of CGPN's common stock on the date of the closing. As recited

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[13.1] Although the Form 10Q was filed on December 1, 2005, its disclosures were for the quarter ending on September 30, 2005. Thus, the Form 10Q provides information about the company that was accurate on the date it entered into the reverse merger agreement with Skystar. Mr. Chien relies on the Form 10Q in his Amended Complaint.

in the Share Exchange Agreement, as of the closing, CGPN had 500,000,000 shares outstanding. *Id.* at 37.

On January 23, 2006, CGPN, now Skystar, filed a Form 14f-1 with the SEC, which stated that Messrs. Cramer, Lowe and Wassung had failed to file their Forms 3, 4 and 5 with the SEC. Specifically, the company stated, "[b]ased solely on the company review of these reports or written representations from certain reporting persons, during the year ended December 31, 2004, and during the current fiscal year, the Company believes that all filing requirements applicable to the Company's officers and directors subject to Section 16(a) of the Exchange Act were met, except that directors R. Scott Cramer, Steve Lowe and former director David Wassung were not able to file their Form 3 within 10 days after he was elected or appointed an officer and/or director of the Company nor were Cramer, Lowe and Wassung able to file Form 4's or Form 5's in connection with transactions that occurred in the last fiscal year and/or in the current fiscal year." *See* Amended Compl. [doc. #35] at 6-7, ¶ 2. CGPN, now Skystar, also filed a Form 10-K with the SEC on or about April 17, 2006. That report stated as follows:

> On November 7, 2005, the Company issued 201,849,516 (pre 1-for-397 Reverse Split) shares of common stock valued at approximately $0.0025 per share (the average price over the last 90 trading days prior to September 1, 2005, the date on which the Board authorized the issuances for amounts owed to Mr. Cramer, Mr. Lowe and Mr. Wassung) to its former Chief Executive Officer

> and current Director, R. Scott Cramer as payment for accrued salary and expenses owed to him in the amount of $573,270. On November 30, 2005, the Company also issued 68,100,454 (pre 1-for-397 Reverse Split) shares of common stock valued at approximately $0.0025 per share to its former officer and current Director, Steve Lowe as payment for accrued salary and expenses owed to him in the amount of $195,954. On November 7, 2005, the Company also issued 46,511,365 (pre 1-for-397 Reverse Split) shares of common stock valued at approximately $0.0025 per share to its former Director, David Wassung, as payment for accrued salary and expenses in the amount of $133,833.

Id. at 7-8, ¶ 4.

In his Amended Complaint, Mr. Chien alleges that he purchased 6,391,700 shares of CGPN common stock beginning in "approximately the end of September 2005 to November 4, 2005." *See* Amended Compl. [doc. # 35] at 8, ¶ 5. He claims that he was defrauded because he did not know that CGPN's issued and outstanding shares, which he believed totaled only 177,188,665, would be "significantly diluted" in connection with the reverse merger. *Id.* at 7, ¶ 3. According to Mr. Chien, "after November 7, 2005, there were 500,000,000 shares [issued and outstanding, and] ... [t]he issued new common stock severely diluted the share's value, and caused the stock price to drop by 65%." *Id.* at 8, ¶ 5. He alleges that this "dilution was not reported on any filed SEC Filings despite filings being made, "*id.* at 22, ¶ 46, and that "Defendants also gave no advance notice to the Plaintiff or to any other shareholders of the merger or of the dilution by issue of additional shares," *id.* at 22, ¶49. According to Mr. Chien "in reliance on the misrepresentation of the Defendants [he] purchased 6,391,700 shares of common stock, which he thought would be valuable because the company misrepresented the amount of common shares as 177,188,665." *Id. at* 23, ¶ 50.

B.

Mr. Chien filed this lawsuit on May 17, 2007, alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. *See* Complaint [doc. # 1]. Promptly thereafter Defendants moved to dismiss the Complaint under Rules 12(b)(6) and 9(b) and the PSLRA. *See* Defendants' Motion to Dismiss [doc. # 23].[14]

In accordance with the Court's usual practice, the Court held an on-the-record telephonic conference with counsel for the parties and asked Mr. Chien's counsel if he would like to amend the complaint to address the alleged defects raised in Defendants' Motion to Dismiss. As the Court explained, "It's been my practice to, before re briefing begins, *see* if the plaintiff would like to file, take one last chance to plead, to amend the pleadings to address any of the claims made in the motion to dismiss." Transcript of

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[14] Defendants Skystar, Cramer and Lowe also moved to dismiss the complaint under Rule 12(b)(2) for lack of personal jurisdiction. That motion was also denied without prejudice to renewal following the Court's ruling on the Rule 12(b)(6) motion.

Nov. 29, 2007 Conference at 2:23-3:1, Defendants' Mem. of Law in Support of Renewed Mot. To Dismiss Amended Complaint For Failure to State a Claim Pursuant to FRCP 12(b)(6) [doc. # 41] ("Mem. In Support of Renewed Mot. To Dismiss"), Ex. A. The Court further stated:

> And the reason I do that is the Second Circuit really urges courts, if they're going to dismiss a claim for failure to state a claim, to give the parties a chance to amend, but to me, it doesn't make any sense for me to decide the motion first and then offer a chance to amend. It makes more sense to offer the chance to amend before I decide the motions, and then have the plaintiff put forth whatever additional allegations they feel they can and should make, consistent with their obligations under Rule 11.
>
> [T]he motion [to dismiss] claims that you have not pled claims with sufficient particularity as required by 9(b) and the PSLRA, and before I decide that motion, I wanted to know if you wanted the opportunity to try to address any of those concerns.

Id. at 3:1-17. Mr. Chien's counsel stated that he would like the opportunity to amend and that he "would take [his] best shot at it," to which the Court responded, "Exactly, that's the key." *Id* at 4:15-18. The Court expressly cautioned counsel as follows:

> Well, I will give you one opportunity to [amend] and so you will want to do as much as you think you need to do consistent with Rule 1] ...

> What I don't want to have happen is a situation where you amend, I decide the ... motion to dismiss, I decide it adversely to you, I don't want you to then say, oh geez, Judge, I have a few more facts to allege ....

Id. at 4:6-14. The Court then set a schedule for the filing of an amended complaint and denied the Motion to Dismiss without prejudice to renewal "following the filing of an amended complaint that will address to the extent possible, consistent with Rule 11, the alleged defects asserted in the motions to dismiss." Order Denying Motions to Dismiss Without Prejudice [doc. # 31].

Mr. Chien filed his Amended Complaint [doc. # 35] on January 4, 2008, and Defendants then renewed their Motion to Dismiss [doc. # 39]. The Court held oral argument on the Motion to Dismiss on July 8, 2008 at which time Mr. Chien was represented by counsel. However, several days later, Mr. Chien's counsel sought to withdraw, *see* Motion to Withdraw [doc. # 62], on the ground that "continued representation of the plaintiff will likely result in the violation of one or more of the Rules of Professional Responsibility, including Rules 3.1, 1.16 and 2.1." *See* Affidavit of Kenneth A. Votre to Withdraw [doc. # 63], ¶ 5. During an in-court conference with Mr. Chien and his counsel on July 11, the Court advised Mr. Chien about the dangers of representing himself in a complex matter such as this, but Mr. Chien stated that he wished to discharge his counsel and to represent himself *pro se*. Upon the filing of a *pro se* appearance, the Court granted Mr. Chien's counsel's motion to withdraw, see Order [doc. # 65], and heard further argument by Mr. Chien *pro se* in opposition to the Motion to Dismiss. During that argument, Mr. Chien appeared to be making claims beyond those alleged in his Amended Complaint. As a consequence, the Court informed Mr. Chien that the Court would decide the pending Motion to Dismiss on the basis of the allegations in the Amended Complaint and that if, after the Court's ruling, Mr. Chien wished to amend his complaint further, he could move the Court – upon a showing of good cause – to permit a further amendment, providing a copy of any proposed amended complaint along with his motion.

II.

This Court has previously had an opportunity to explain the pleading requirements for securities fraud actions. *See Beary*, 520 F. Supp.2d at 362-65; *Collier*, 2005 WL 1949868, at * 5. A complaint alleging securities fraud must meet the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the PSLRA. *See ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007); *Ganino v. Citizens Utils Co.*, 228 F 3d 154, 168 (2d Cir. 2000). Rule 9(b) requires all claims of fraud to be pleaded with particularity. The Second Circuit "has read Rule 9(b) to require that a complaint '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang*, 355 F. 3d 164, 170 (2d Cir. 2004) (quoting *Mills v. Polar Molecular Corporate.*, 12 F 3d 1170, 1175 (2d Cir. 1993)). Similarly, the PSLRA requires that

> any securities fraud complaint alleging misleading statements or omission[s] of material fact[s] must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

Rombach, 355 F 3d at 170 (quoting 15 U.S.C. § 78u-4(b)(1)). As the Second Circuit emphasized in *Lentell v. Merrill Lynch & Co.*, "[a]ny fraud must be pled with particularity, but the rule is applied assiduously to securities fraud." 396 F. 3d 161, 168 (2d Cir. 2005) (citation omitted). "This Circuit's strict pleading requirements in securities-fraud cases were (essentially) codified in the Private Securities Litigation Reform Act of 1995. So no claim should be filed unless and until it can be supported by specific factual allegations." *Id.* (citations omitted).

In *Lentell*, the Second Circuit also explained that in order to state a claim under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240. 10b-5(b), securities fraud plaintiffs must plead with particularity that a defendant "(1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury." *Lentell*, 396 F.3d at 172 (quoting *In re IBM Corp. Sec. Litig.*, 163 F. 3d 102, 106 (2d Cir. 1998)). The last two requirements are typically referred to as "transaction causation" and "loss causation." *See Lentell*, 396 F. 3d at 172-73. Transaction causation is "akin to reliance," *id*. at 172, and "[i]n the securities fraud context, transaction causation is presumed when a claim rests on a material omission." *Castellano v. Young & Rubicam, Inc.*, 257 F 3d 171, 186 (2d Cir. 2001). By contrast, the Second Circuit has "described loss causation in terms of the tort-law concept of proximate cause, i.e., that the damages suffered by plaintiff must be a foreseeable consequence of any misrepresentation or material omission, but the tort analogy is imperfect." *Lentell*, 396 F. 3d at 172-73 (citations and quotations omitted). Finally, the Supreme Court recently explained that in pleading scienter under the PSLRA, a plaintiff must plead facts giving rise to a "strong ... cogent and compelling" inference of scienter, taking into account plausible opposing inferences. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Connecticut. 2499, 2510 (2007); *see also ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F. 3d 87, 99 (2d Cir. 2007).

In their Motion to Dismiss, Defendants essentially argue that Mr. Chien has failed to properly plead any of the required elements of a securities fraud action. There are, indeed, many defects in the allegations of the Amended Complaint, but two are most apparent and more than sufficient to support dismissal of the Amended Complaint.

A.

The Amended Complaint is noticeably short on facts pleaded with particularity and long on general and conclusory allegations, a defect that would itself be a basis for dismissing the Amended Complaint.[15] *See Rombach*, 355 F.3d at 170 ("To meet the pleading standard of Rule 9(b), this Court has repeatedly required, among other things, that the pleading explain why the statements were fraudulent. The PSLRA imposes similar requirements to claims brought under the Exchange Act: the complaint shall specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." (citations and quotations omitted)). For instance, the Amended Complaint makes repeated allegations that CPGN's filings were "inaccurate and false," *see* Amended Compl. [doc. # 35] at 16, ¶ 33; *see also id.* at 20, ¶ 45, without specifying which statements Mr. Chien has in mind or why they were false. *See also* Amended Compl. [doc. # 35] at 15, ¶ 32 ("Many of the Company's false statements during the class period were made in 8-K's, 10-K's, and 10-Q's.").

However, to the extent that any aspect of the Amended Complaint is pleaded with particularity, it appears that the fraud theory propounded by Mr. Chien in the Amended Complaint is that Defendants purposely hid from the investing public, and Mr. Chien in particular, the fact that in connection with the reverse merger CGPN would issue large amounts of common stock, thereby increasing the number of issued and outstanding shares from approximately 177 million to 500,000,000, and that this alleged significant dilution of the company's common stock led to a sharp decrease in the price of the stock.[16] Thus, paragraph 37 and 38 asserts that he purchased shares and "retained those shares not expecting a dilution of his interest," and that the "value of his shares dropped once the devaluation was disclosed." Amended Compl. [doc. # 35] at 16, ¶¶ 37, 38. Paragraph 39 claims that CGPN did not "admit the existence of the granted 316,461,335 shares of common stock," which increased the issued and outstanding shares from approximately 177 million to 500,000,000. *Id.* at 17, ¶ 39. Paragraph 46 alleges that on November 7, 2005, CGPN "diluted the publicly traded interest in the Company significantly," and that the "dilution was not reported on any filed SEC Filings despite filings being made." *Id.* at 22, ¶ 46. Paragraph 55 claims that Defendants carried out a scheme to deceive the public regarding the fact that the company would "severely dilute the stock of common shares." *Id.* at 23, ¶ 55. Indeed, at oral argument on the motion, Mr. Chien's then-counsel acknowledged that the theory of fraud in the Complaint is that Defendants did not disclose the fact that CGPN's issued and outstanding stock would increase from approximately 177 millions to 500,000,000 shares.

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[15] Even though Mr. Chien was given an opportunity to amend his complaint and also given notice of the inadequacies of his original complaint, the Amended Complaint contains few specifics and principally adds only adjectives and some general allegations, none of which comply with the particularity requirements of Rule 9(b) and the PSLRA.

The fundamental problem with this fraud theory is that the SEC filings show that the issuance of additional new shares was not withheld from Mr. Chien or the investing public.[17] For one, the press release announcing the transaction noted that it would be accomplished through issuance of new shares. While the press release itself did not give details on the transaction, the Form 8-K timely filed four business days later attached a copy of the Share Exchange Agreement. That agreement, as Mr. Chien acknowledges, *see* Amended Compl. [doc. # 35] at 10, ¶9, fully disclosed that in connection with the transaction, the company would change the issued and outstanding shares from approximately 177 million to 500,000,000, and also that all material debt would be eliminated before the closing. It is true that the Form 8-K does not state to whom the shares would be issued and in what proportion, but the theory of fraud propounded in the Amended Complaint is not dependent on the recipient of the shares. Instead, it is focused on the *issuance* of the additional stock itself and it is undisputed that as of September 26, 2005, the investing public knew in a timely manner that in connection with the transaction, the number of issued and outstanding shares would increase to 500,000,000.[18] *Novaks*,

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[16] The Court notes that the Amended Complaint never explains why or how the issuance of the additional shares of common stock caused "dilution" given the fact that the stock was issued to discharge ostensibly valid debts owed to Defendants that were carried on CGPN's books. However, for the purposes of the Motion to Dismiss, the Court will assume as alleged in the Amended Complaint that the issuance of the stock resulted in dilution.

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[17] In their Request for Judicial Notice [doc. # 25], Defendants attached a number of internet postings in September 2005 by an individual identified as "andrewchien." These postings discuss the fact that the company's common stock would be "diluted" (the word used in the postings) and that the company would be "generous to Cramer, etc. because he and other BODs also lost money." The postings also discuss CGPN's Form 8-K of September 26, 2005. The Court declined to consider these internet postings for purposes of the Motion to Dismiss, but the Court indicated that it would consider the postings (which Mr. Chien admitted on the record were his postings) if Defendants sought sanctions under the PSLRA.

[18] Paragraph 39 curiously complains that the company's Form 10Q issued in December 2005 reported that *for the period ended September 30, 2005*,

216F.3d at 314 n.1 (holding that the critical question is "whether the facts alleged are sufficient to support a reasonable belief as to the misleading nature of the statement or omission").

At various points in his briefing, Mr. Chien claims that all of the company's disclosures before September 26, 2005 were inaccurate because they stated that the company had approximately 177 million shares issued and outstanding and the shareholdings of Messrs. Cramer, Lowe and Wassung were shown as substantially less than they were after issuance of the new shares. But those statements were true at the time made since the shares were not issued until November 7, 2005. Plaintiff also complains that the Defendants knew that there would be an "impending dilution of outstanding publicly held shares" long before the September 26, 2005 disclosure of the Share Exchange Agreement, and yet never disclosed it. *See* Plaintiff's Mem. Of Law in Opp. To Renewed Mot. To Dismiss [doc. # 46] at 9. However, CGPN was under no duty to disclose the pendency of merger talks with Skystar until September 20, when an agreement was finally reached, unless insiders were trading on the information of the impending merger, the merger talks made other statements false or misleading, or disclosure was required under other SEC rules – none of which is alleged in the Amended Complaint. *See, e.g., In re Time Warner Sec. Litig.*, 9 F .3d 259, 267

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the company had issued an outstanding shares of approximately 177 million. But that statement is indisputably correct, since the additional shares, first reported in the September 26 Form 8K, were not issued until November 7, 2005. Moreover, the company filed a Form 8K dated November 14, 2005 that reported that it had issued additional shares and that the issued and outstanding shares now totaled 500 million.

(2d Cir. 1993) ("[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather, an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts."); *Glazer v. Formica Corp.*, 964 F.2d 149, 156 (2d Cir. 1992) (finding that there was no duty to disclose merger talks and therefore no § 10(b) violation); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 239 (1988) ("To be actionable, of course, a statement must also be misleading. Silence, absent a duty to disclose, is not misleading under Rule 10b-5.").

At oral argument and particularly after the withdrawal of his counsel, Mr. Chien also argued that the company committed fraud by not telling shareholders before the November 14, 2005 Form 8-K which individuals would receive the newly issued shares and for what price.[19] He appears to complain that the shares were issued for less than adequate consideration and/or were issued improperly without an allegedly required vote by shareholders. Such allegations may or may not state a cause of action for securities fraud, but there can be no doubt that these claims are not alleged with particularity in the Amended Complaint. Mr. Chien was represented by counsel at the time of the Amended Complaint and his counsel was well aware of Defendants' assertion that Mr. Chien's original complaint did not adequately plead fraud. Yet, when it came to the Amended Complaint, Mr. Chien alleged a claim of fraud based upon the issuance of additional shares of common stock, the same fraud theory that was asserted in the original complaint. That claim – the only claim pleaded with any semblance of the particularity required by Rule 9(b) and the PSLRA – is simply not borne out by the SEC filings on which it is based.

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[19] Paragraph 40 of the Amended Complaint does complain that with the issuance of the additional shares Messrs. Cramer, Lowe and Wassung "controlled the Company instead of managing the Company." But the Share Exchange Agreement made public on September 26 disclosed that Messrs. Cramer, Lowe and Wassung controlled "at least a majority" of CGPN's shares.

B.

Even if Mr. Chien had pleaded fraud with sufficient particularity under Rule 9(b) and the PSLRA, his Amended Complaint fails adequately to plead loss causation. To establish loss causation, "a plaintiff must allege . . . that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered, *i.e.*, that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security. Otherwise, the loss in question was not foreseeable." *Lentell*, 396 F.3d at 173; *see also Dura Pharmaceuticals, Inc.*, 544 U.S. 336, 347 (2005) (A plaintiff in a securities fraud action must provide the defendant "with notice of what the relevant economic loss might be [and] of what the causal connection might be between that loss and the [alleged] misrepresentations.").

In his Amended Complaint, Mr. Chien does not say precisely when he purchased his shares or if he has ever sold them. In the section of his Amended Complaint labeled "Loss Causation," he merely says that he "purchased 6,391,700 shares of common stock, which he thought would be valuable because the company misrepresented the amount of common stock as 177,188,665." Amended Compl. [doc. # 35] at 23, ¶ 50. And he states that his damages total $52,766.77, *id.* at 23, ¶ 52, although he fails to explain how he arrived at this figure. In paragraph 5 at page 8 of his Amended Complaint he also says that he purchased his CGPN shares from the "end of September 2005 to November 4, 2005," and that the severe dilution of the shares "caused the stock price to drop 65%." Id. at 8, ¶ 5.[20]

The allegations of the Amended Complaint are simply not sufficient. It is entirely unclear from the Amended Complaint when Mr. Chien suffered his alleged loss of $57,766.77, let alone whether the loss was causally related to the disclosure that the company would be issuing additional shares. As noted above, CGPN disclosed as of September 26 that at the closing 500,000,000 shares would be issued and outstanding, rather than the approximately 177 million that had previously been issued. According to the stock quotations provided in Defendants' Request for Judicial Notice, the company's stock price increased substantially from the date of that announcement through November 4, 2005. On September 20, the stock was trading at approximately

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[20] Given the fact that Mr. Chien ceased buying CGPN stock as of November 4, 2005, any alleged misstatements in the company's November 14 and December 1, 2005 filings are not actionable. *See Gurary v. Winehouse*, 235 F.3d 792, 799 (2d Cir. 2000) (purchases occurring before an alleged deception are not "in connection with the purchase and sale of a security" as required for a claim under § 10 or Rule 10b-5). Those misstatements obviously could not have induced Mr. Chien to purchase any securities; nor could he have relied upon them in connection with his earlier purchases.

$1.50 per share. On September 26, the stock was trading at about $2.39 per share and as of November 4, the share price was about $4.50.[21] *See* Request for Judicial Notice, Exs. C-F. If, as Mr. Chien alleges, the disclosure of the issuance of additional shares led to his losses, one would have expected the share price to drop following the September 26 disclosure, not increase. Moreover, as Mr. Chien's counsel acknowledged at oral argument, by the November 14 Form 8-K, Mr. Chien and the public knew full well not only that additional shares were issued, but also that they were issued to Messrs. Cramer, Lowe and Wassung. Yet on November 19, 2005, after the November 14 Form 8-K had again disclosed the issuance of additional shares of common stock and had also disclosed that Messrs. Cramer, Lowe and Wassung were the recipients of the new shares, the stock's price remained at approximately $4.00 per share. It is true that later in 2005, the stock price began to decline, but it then rebounded in mid-January and February 2006 back to about $4.00 per share.[22]

There certainly is nothing about the performance of the share price in the wake of the company's disclosures that would demonstrate or even suggest any causal connection whatsoever between the alleged misstatements or omissions and the harm actually suffered by Mr. Chien (assuming that he suffered any harm, since we do not know from the Amended Complaint when or if he ever sold his shares). *See Lentell*, 396 F 3d at 174; *Collier*, 2005 WL 1949868, at * 11. As the Supreme Court explained in *Dura Pharmaceuticals*, "[w]hen the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions or other events which taken separately or together account for some or all of that lower price." 544 U.S. at 342-343. This is particularly true with a stock such as CGPN's that is so thinly traded. That is why the Second Circuit has cautioned that "it is not enough to allege that a defendant's misrepresentations and omissions induced a purchase-time value disparity between the price paid for a security and its true investment quality." *Lentell* 396 F.3d at 174 (quotations omitted). Yet, despite the opportunity to amend his complaint to address the issue of loss causation, Mr. Chien still has not plead facts sufficiently to show the necessary linkage between his alleged loss and the failure to disclose the issuance of additional shares that forms the basis of his Amended Complaint.

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[21] In February 2006, CGPN effected a 397 to 1 stock split and all stock prices are adjusted to reflect the stock split.

[22] In the "Additional Factual Background" in his sur-reply, Mr. Chien alleges that the stock price "gradually dropped sharply." PL's Sur-Reply [doc. # 56] at 2. According to the stock quotations, however, the stock dropped neither gradually nor sharply until many months after the merger occurred and even then, the stock price remained above where it was before the merger.

Apparently concerned about his failure to plead loss causation, Mr. Chien's counsel filed a sur-reply brief before argument in which he provided "Additional Factual Background." See Plaintiff's Sur-Reply to Defendants' Reply to Plaintiffs Mem. In Opposition to Mot. To Dismiss [doc. # 56] ("Plaintiffs Sur-Reply"). In the sur-reply, counsel states that Mr.

Chien began to purchase shares on September 21, 2005, the day after the press release announcing the Skystar merger, and that he ceased to acquire shares as of November 4, 2005, several days before the closing. He also alleges that he purchased his shares at an average price of $5.00, though he does not say how he arrived at that figure. Even in his sur-reply, however, Mr. Chien persisted in failing to state whether he had sold any of his shares or when. At oral argument on July 9, Mr. Chien's counsel acknowledged that Mr. Chien had sold a small portion of his holdings in mid-October 2005[23] and that as of the oral argument he still owned the rest of the shares. In connection with his counsel's motion to withdraw, Mr. Chien represented to the Court that he sold all of his shares the day after the oral argument, July 9, for an average price of approximately $2 per share, which is higher than the approximately $1.50 price for the shares before the merger was announced on September 20.

The Court declines to consider the new facts alleged in the sur-reply and by Mr. Chien at oral argument for the simple reason that they are not alleged in the Amended Complaint, and Mr. Chien has never sought to amend his complaint to add those facts. To be candid, however, the Court is singularly unimpressed by these new facts, particularly Mr. Chien's allegation of a loss on his recent sale of stock. *See Dura Pharmaceuticals*, 544 U.S. at 342 ("Other things being equal, the longer the time between purchase and sale, the more likely that . . . other factors caused the loss."); *First Nationwide Bank v. Gelt Financing Corp.*, 27 F.3d 763, 769-72 (2d Cir. 1994) (same). The new facts certainly do nothing to undermine the Court's conclusion based on the facts pleaded in the Amended Complaint that Mr. Chien has failed to allege facts showing that the alleged misstatements or omissions by CGPN "concealed something from the market that, when disclosed, negatively affected the value of the security." *Lentell*, 396 F.3d at 173.

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[23] Mr. Chien's counsel acknowledged at oral argument that he could not establish loss causation for his client's October 2005 sales because under his theory, no one knew at that point that the additional shares would be issued to Messrs. Cramer, Lowe and Wassung; according to Mr. Chien, that fact was not disclosed until the November 14 Form 8-K.

IV.

Mr. Chien also asserts a claim against the individual Defendants under § 20(a) of the Exchange Act for "controlling-person liability." 15 U.S.C.§78t(a) of the Exchange Act for "controlling-person liability." 15 U.S.C. §78t(a). In order to state a cause of action under § 20(a), a plaintiff must plead, among other things, a primary violation by a controlled person. *See Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998); *Collier*, 2005 WL 1949868, at * 17. The Court has already held that Mr. Chien's primary § 10(b) and Rule 10b-5 claims are inadequately pleaded and must be dismissed. Accordingly, the Court dismisses Mr. Chien's secondary § 20(a) claim.

V.

Because the Amended Complaint does not adequately plead fraud or loss causation, the Court GRANTS Defendants' Motion to Dismiss the Amended Complaint [doc. #39] and all claims against all Defendants are dismissed. If Defendants intend to seek sanctions under the PSLRA, they must file a motion to that effect no later than August 7, 2008. If Mr. Chien would like the Court to consider whether it would allow any amendments to the Amended Complaint, he must file a motion to that effect no later than August 7, 2008. The motion should explain why the Court should permit another amendment of the complaint and should attached any proposed amended complaint.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: July 17, 2008.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECICUT

Andrew Chien	)	
Plaintiff	)	No. 3:07CV781
v.	)	(MRK)
SKYSTAR BIO	)	
PHARMACEUTICAL	)	
Co. et al.	)	
Defendants	)	

RULING AND ORDER

On July 17, 2008, the Court granted Defendants' Motion Dismiss and dismissed this action in its entirely. See Ruling and Order [doc. #71].Thereafter, Defendants filed a Motion for Sanctions [doc. #74] against Mr. Chien and his former counsel Kenneth Votre. Mr.Chien, Mr. Votre, and Defendants all filed briefs in support of their positions. The Court held oral argument on December 11, 2008 on the Motion for Sanctions and allow the parties until January 23, 2009 to file any supplemental briefing. Mr. Votre filed a supplemental briefing on January 23, 2009. *See* Supp. Mem. In Opp'n to Mot. for Sanctions [doc. #103]. In stead of addressing the Motion for Sanctions, Mr. Chien filed a Motion for reopen [doc. #104], requesting the Court reopen his case and permit him to amend his complaint. For the reasons that follow, Defendants' Motion for Sanctions [doc. #74] is GRANTED in part and DENIED in part and Mr. Chien's Motion for Reopen [doc. #104] is DENIED.

Mr. Chien filed this lawsuit on May 17, 2007, alleging violation of §§10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§78j(b), 78t(a), and SEC Rule 10b-5, 17C.F.R. §240.10b-5 in connection with a 2005 reverse merger between Cyber Group Network Corporation ("CGPN")and Skystar. *See* Complaint [doc. # 1].[1] Promptly thereafter Defendants – who include former directors and officers of CGPN as well as Skystar moved to dismiss the Complaint under Rules 12(b)(6) and 9(b) of the Federal Rules of Civil procedures and the Private securities Litigation reform Act ("PSLRA"), 15 U.S.C. §78u-4(b)(1). *See* Defendants' Motion for Dismiss [doc. #23].

In addition, Defendants filed a request for Judicial Notice [doc. #25], which, among other things, requested that the Court take judicial notice of a series of posting on the website ragingbull.com by an individual identifying himself as "andrewchien." Defendants pointed out that, if "andrewchien" was indeed Andrew Chien in this action, the postings seriously undermined Plaintiff's theory of this case. In the complaint, Plaintiff alleged that Defendants carried out a scheme to deceive the public regarding the fact that the company would dilute its stock in connection with the reverse merger in order to satisfy unpaid debts to CGPN's directors. The complaint stated that Mr. Chien bought CGPN stock in reliance of the fact that there would be no dilution and was injured when dilution occurred. Critical to Mr. Chien's theory of fraud was that neither he nor the public knew that dilution would occur until long after the merger took place.

However, the "andrewchien" in the ranging bull.com postings appears to anticipate that dilution will occur. In one posting, "andrewchien" states that "the CGPN had $ 1m in debt. Is Cramer a generous person? He wants to take most of the pie, or he is willing to give most of it to the shareholders. Time will tell." In another posting, "andrewchien" states that there "(m)ay be some dilution because the company had some unpaid money to the manager. I hope the dilution will not be huge. Then the stock will reverse after Monday's news." In yet another posting, "andrewchien" writes that "[e]ven there will be some dilution, it still may rally because the new shares are restricted." Defendants argued that if these postings were indeed authored by Plaintiff, then it was apparent that he knew that dilution would occur and that not purchase CGPN stock in reliance of the fact that it would not occur as alleged in the complaint.

In accordance with the Court usual practice, the Court held an on-the–record telephone conference with counsel for the parties and asked Mr. Chien's counsel, Mr. Votre, if he would like to amend the complaint to address the alleged defects raised in Defendants' Motion to Dismiss. As the Court explained, "It's been my practice to, before briefing begins, see if the plaintiff would like to file, take one last chance to plead, to amend the pleadings to address any of the claims made in the motion to dismiss." Transcript of Nov. 29, 2007 Conference at 2:23-3:1, Defs.' Mem. of Law in Support of Renewed Mot. to Dismiss[doc. #41] Ex. A. The Court further stated:

1.Mr. Chien's claims are set out at length in the Court's Ruling and Order[doc. #71] dated July 17, 2008.

> And the reason I do that is the Second Circuit really urges courts, if they're going to dismiss a claim for failure to state a claim, to give the Parties a chance to amend, but to me, it doesn't make any sense for me to decide the motion first and then offer a chance to amend. It makes more sense to offer the chance to amend before I decide the motions, and the have the plaintiff put forth whatever additional allegations they feel they can and should make, consistent with their obligation under rule 11.
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> [T]he motion [to dismiss] claims that you have not pled claims with sufficient particularity as required by 9(b) and the PSLRA, and before I decide that motion, I wanted to know if you wanted the opportunity to try to address any of those concerns.

Id. at 3:1-17. Mr. Votre stated that he would like to opportunity to amend the complaint and that he "would take [his] best shot at it," to which the Court responded, "Exactly, that is the key." *Id.* At 4:15-18. The Court expressed cautioned counsel as follows:

> Well, I will give you one opportunity to [amend] and so you will want to do as much as you think you need to do consistent with Rule 11...What I don't want to have happen is a situation where you amend, I decide the ... motion to dismiss, I decide it adversely to you, I don't want you to then say, oh geez, Judge, I have a few more facts to allege....

Id. at 4:6-14. The Court then set a schedule for the filing of an amended complaint and denied the Motion to Dismiss without prejudice to renewal "following the filing of an amended complaint that will address to the extent possible, consistent with Rule 11, the alleged defects asserted in the motion to dismiss." Order Denying Motion to Dismiss without prejudice to renewal "following the filing of an amended complaint that will address to the extent possible, consistent with Rule 11, the alleged defects asserted in the motions to dismiss." Order Denying Motions to Dismiss Without Prejudice [doc. #31]. The Request for Judicial Notice [doc. #25] remained pending.

Mr. Chien filed his amended complaint on January 4, 2008, and defendants then renewed their Motion to Dismiss [doc. #39]. The amended complaint, with very few additions, was practical identical to the original complaint and did not address the deficiencies raised by the defendants in their first Motion to Dismiss. At or around the time their renewed Motion to Dismiss, Defendants uncovered additional postings on rangingbull.com by "andrewchien" in which he discusses the instant lawsuit and posts the complaint. In his response to the Request for the Judicial Notice, Plaintiff did not deny that the posting were his and instead objected on the grounds that it was not proper for the Court to take notice of the postings in connection with the renewed Motion to Dismiss.

The Court held oral argument on the renewed Motion to Dismiss on July 8, 2008 at which time Mr. Chien still represented by Mr. Votre. The Court made clear that it did not believe the complaint had any merit.

> To the extent to which I am actually limited to the amended complaint that was filed in response to the motion to dismiss, I honestly don't think there's any question but that [it] has to be dismissed, I honestly don't. It's not adequate.

Transcript[doc. # 98] at 44. The Court also noted that, although the Court would not consider the rangingbull.com postings on the Motion to Dismiss, the Court would consider them on any subsequent sanctions motion. *Id.*

Several days later, Mr. Votre sought to withdraw as Mr. Chine's counsel, *see* Motion to Withdraw [doc. # 62] on the ground that "continued representation of the plaintiff will likely result in the violation of one or more of the Rules of Professional Responsibility, including Rule 3.1, 1.16 and 2.1." *See* Affidavit of Kenneth A. Votre to Withdraw [doc. #63], ¶5. During an in-court conference on July 11, 2008, the Court granted Mr. Votre's Motion to Withdraw, and Mr. Chien, now representing himself, admitted that the postings on rangebull.com were his and also admitted that he had read and approved of both the original and amended complaints.

On July 17, 2008, the Court granted Defendants' renewed Motion to Dismiss [doc. #39]. In its Ruling and Order, the Court noted that there were "many defects in the allegations of Amended Complaint." *See* Ruling and Order [doc. #71] at 10. The Court focused its opinion on two of defects: first, that Mr. Chien had not shown that the issuance of new stock to

Defendants was withheld from the public, and the second, that Mr. Chien had failed to show loss causation. The Court also noted that "[t]he Amended Complaint is noticeable short on facts pleaded with particularly and long on general and conclusory allegations, a defect that would itself be a basis for dismissing the Amended Complaint." *Id.* at 10. Subsequently, defendants filed Motion for Sanctions [doc. #74] against both Mr. Chien and Mr. Votre.

II

The PSLRA provides that "upon final adjudication of [a securities] action, the court *shall* include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11 (b) of the Federal Rules of Civil Procedure." 15 U.S.C. §78u-4(c)(1) (emphasis added); *see also Simon DeBartolo Group, L. P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157,167(2d Cir.1999) ("Ordinarily, courts are under no particular obligation to make findings with regard to the compliance of litigants and their counsel. This is no longer the case, however, in the securities litigation context."(citation omitted)). It further dictates that "[i]f the court makes finding...that a party or attorney violated any requirement of Rule 11(b)... the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedures." 15 U.S.C. §78u-4(c)(2) (emphasis added). In other words, the PSLRA "requires...that the court impose sanctions if it determines the rule has been violated." Simon DeBartolo, 186 F.3d at167. " The PSLRA does not in any way purport to alter the substantive standards for finding a violation of Rule 11, but functions merely to reduce courts' discretion in choosing whether to conduct the Rule 11 inquiry at all and whether and how to sanction a party once a violation is found." *Id.*

Thus, the first inquiry under the PSLRA is whether there has been a Rule 11(b) violation. Rule 11(b) states in relevant part:

> By presenting to the court a pleading, written motion, or other paper - whether by signing, filing, submitting, or later advocating it –an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... (2) the claims, defenses, and other legal contentions arc warranted by existing law or by a nonfrivolous argument for extending, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery ...

Sanction for the legal insufficiency or frivolousness of the complaint must run against the attorney alone. *See* Fed. R. Civ. Pro. 11(c)(5) ("The court must not impose a monetary sanction: (A) against a represented party for violating Rule 11 (b)(2)."); *see also Byrne v. Nezhat,* 261 F. 3d 1075, 1118(11th Cir. 2001) ("Rule 11 does not permit sanctioning a client, however, when the basis for the sanction is that the pleading was legally frivolous."); *Baffa v. Donaldson.* 222 F.3d 52, 57 (2d Cir. 2000) ("The district court also cannot order sanctions for violation of Rule 11(b)(2) against a represented party.") However, both a represented party and his attorney may be sanctioned under Rule 11(b)(3) for the factual insufficiency of a complaint. *See* Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986) ("[A] sanction for attorneys' fees may be imposed either on the attorney who signs a paper, or on the party he represents, or on both."); *Simpson v. Putnam County Nat'l Bank,* 112 F. Supp. 2d 284, 291(S.D.N.Y. 2000)(same). Defendants claim that the original and amended complaint, were legally and factually frivolous and that sanctions should run against both Mr. Votre and Mr. Chien.

A.

The Court first considers whether the original and amended complaints violated Rule 11(b)(2), which would run against Mr. Votre alone. In order for a claim to violate Rule 11(b)(2), a pleading "must be or border on the frivolous." *Healey v. Chealsea Resources Ltd.,* 947 F.2d 611, 626 (Cir.1991); *see also id.* ("Rule 11 targets situations where it is patently clear that a claim has absolutely no chance of success."); *Gurary v. Nu-Tech Bio-Med.* Inc. 303 F.3d 212.224 (2d Cir. 2002) (using frivolousness as relevant standard under Rule 11 (b)(2)).

The standard for triggering the award of fees under Rule (11)(b)(2) is "objective unreasonableness." *Margo v. Weiss,.* 213 F.3d 55.65 (2d Cir. 2000); *see also Callaway c. Shukat Co.,* 854 F.2d 1452, 1470 (2d. Cir. 1988); Storey v. *Cello Holdings, L.L.C.,* 182 F. Supp. 2d 355, 365 (S.D.N.Y.2002). There is no "empty-head pure-heart" justification for patently frivolous arguments" under Rule 11. *See Simon DeBartolo.* 186

F.3d at 166. The subjective intent of the filer is irrelevant, *Sec Knipe v. Skinner*. 19 F. 3d 72, 75 (2d Cir. 1994). "Rule 11 explicitly and unambiguously imposts an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith... provides [no] safe harbor." *Id* (citations and quotation marks omitted).

The Court is cognizant of the fact that "[i]n determining whether or not a claim was totally unfounded, the courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer" *Healey*, 947 F2d. at 626 (citation and quotation marks omitted). However, even giving the benefit of the doubt to Mr. Votre, the Court concludes that both the original and amended complaints were frivolous. As the Court explained in its Ruling and Order granting the renewed Motion to Dismiss, both complaints failed to plead fraud with any semblance of the particularity required under Rule 9(b) of the *Federal Rules of Civil Procedure*. And at least with respect to the theory of fraud alleged in the complaints, it is fair to say that the complaints failed to allege any fraud at all. All of the alleged material omissions-i.e. the fact that Defendants would own a minority of the shares after the merger and that the merger would be accomplished through the issuance of new shares in Defendants -- were contained in the September 2005 8-K, the filing that allegedly contained the material omissions.

Moreover, and more troubling, the complainer omitted key facts that were necessary to state a successful claim. For instance, the complaints do not state when Mr. Chien purchased his shares,[2] how much he paid for them, or whether he ever sold them, all facts that are critical for pleating loss causation.[3] Mr. Chien later stated in the sur-reply that he purchased the shares for approximately $5.00 a share, although he docs not explain, and the Court cannot understand, how he arrived at this figure given the fact that share fluctuated between $ 1.50 a share to $4.50 a share during this time period. Regardless, this information should have been included in the pleadings, not in the sur-reply.

Finally, after dipping a bit in the month after the merger, the stock again rose to approximately $4.00 before declining over the course of two years. At oral argument, Mr. Votre could not explain to the Court how Defendants' fraud could possibility have caused Mr. Chien's loss it the suck prices actually rose in the months alter the fraud was allegedly exposed. At the point at which Mr. Chien sold his shares, which was apparently shortly after the oral argument on the renewed Motion to Dismiss, almost three years bad passed since Mr. Chien had purchased his shares. During which time several large Wall Street firms had collapsed, and mortgage crisis had unfolded, and the stock market had entered a period of precipitous decline. In such a situation, it was impossible to show that the alleged fraud perpetrated in September 2005 was the cause of Mr. Chien's loss. The Court could go on about the impossibilities and logical inconsistencies contained in the complaints,[4] but the examples cited above are sufficient for the Court to find that the complaints lacked any merit whatsoever and can properly be deemed frivolous.

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[2] The amended complaint does state that Mr. Chien purchased his shares from "approximately the end of September 2005 to November 4, 2005; see "Am. Compl. [doc. # 35] at 8,¶5, but this information was not sufficient to make out a claim because when Mr. Chien purchased his shares within this period was essential for determining whether the purchase took place before or after the alleged fraud.

[3] The Court is well aware that the element of loss causation is not subject it, the heightened pleading standard of Rule 9(b) of the *Federal Rule of Procedure. See Dura Pharms., Inc. v. Broudo*, 544 U,S 336, 346 (2005). However, the amended complaint failed to plead loss causation even under the lower pleading standard found in Rule 8.

It is clear to the Court that Mr. Voter, who did not have much, if any, experience with securities law cases, did not purposefully file a frivolous complain and honestly believed that he had stated a valid claim on behalf his client. However, as explained above, there is no "empty-head pure-heart" jurisdiction for a Rule 11 violation. Rule 11 assumes a competent attorney, *see Eastway Costr. Corp. v. New York*, 762 F.2d 243,254 (2d Cir.1985), and although the Court does not judge Mr. Votre's competence as an attorney in general, it is clear that he did not perform due diligence before bringing this case. The original and amended complaint fall far wide of well-established Supreme Court and Second Circuit precedents as well as the statutory language itself; this is not a case where counsel missed an obscure unreported district court opinion that informed the Court's decision or where the inadequacy of the complaint is apparent only in hindsight.

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[4] In one particularly befuddling example, Mr. Votre argued that Mr. Chien had sustained a loss from the sale of some of his stock that occurred before the alleged fraud had become public. How a fraud that nobody knew about would cause the stock price to drop is a mystery to the Court, and apparently is also a mystery to Mr. Votre given his inability to provide any cogent explanation at oral argument

The Court has even less sympathy for Mr. Votre because the Court gave him a chance to fix the defects in his original complaint and he failed to do so. even though Defendants had already raised the possibility of sanctions. Certainly after Defendants filed their first Motion to Dismiss, Mr. Voter was on notice that the original complaint contained serious deficiencies and that he should either work to address those deficiencies or withdraw the complaint. Instead, he filed an amended complaint that was basically identical to the original complaint. He made no effort whatsoever to address the defects to which Defendants had alerted him.

Nor does the Court believe that Mr. Votre can legitimately argue that the complaints were premised on "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). For example, Mr. Votre could not honestly have been attempting to extend or modify the existing definition of loss causation so that it required neither loss nor causation. And besides, Mr. Votre does not make this argument. *See Gurary v. Winchouse,* 235 F.3d 792, 799-800 (2d Cir. 2000) ("Although litigants are not required to articulate their argument for legal change, they fail to do so at the risk that a court may be unable to supply one *sua sponte*" (citation omitted)).

Therefore, while the Court would prefer to rule otherwise, it has; no choice but to conclude that the complaints, were legally frivolous in violation of Rule 11(b)(2).

B.

Next the Court considers whether the complaints violated Rule (11)(b)(3), which would permit sanctions to run against both Mr. Chien and Mr. Votre. Defendants main argument with respect to Rule (11)(b)(3) is that some of the allegations in the original and amended complaints contradict Mr. Chien's ragingbull.com postings, leading Defendants to conclude that the complaints contained material falsehoods.

For instance, the amended complaint states that Defendants "caused the ownership interest of Plaintiff Chien to be diluted, and intentionally, recklessly and negligently concealed that dilution from Mr. Chien [sic] and others, by the issuance of large numbers of unregistered shares to insiders, causing him a direct economic loss." Am. Comp. [doc. 35] at 2, ¶. The amended complaint also slates that "[a]s a result of the Plaintiffs reliance on the representations made by the Defendants [that would be no dilution], the Plaintiff purchased shares in the Defendant Company and retained those shares not expecting a dilution of his interest." Am. Compl. [doc. #35] at 16, ¶ 37.

However, according to the ragingbull.com postings, which Mr. Chien did know-or at least strongly suspected that dilution would occur and that might be substantial. Statements such as "there will be some dilution" and there "[m]ay be some dilution because the company had some unpaid money to the manager" cannot be interpreted in any otherway. Mr. Chien argues that he knew that some dilution might occur, but did not know that his shares would be diluted to the extent that they were. But, of course, the amended complaint does not state that there was more dilution than he expected. Instead, it states that Mr. Chien did not expect any dilution at all. And that statement is simply not true.

Mr. Chien also argues that regardless of whether he knew dilution would occur, Defendants still withheld material information from him and the public. As explained above and in the Court's previous Ruling and Order [doc. # 71], the Court rejects the argument than the Company withhold this information. But even if it were true, Mr. Chien would still need to show transaction causation, or that "but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental security transaction." *Lentellf v. Merrill Lynch & Co.*, 396 F.3J 161, 172 (2d Cir. 2005). According to the ragingbull.com postings. Mr. Chien was await that dilution would occur and yet took the risk of dilution and purchased the stock anyway, apparently hoping that "it still may rally because the new shares arc restricted." Given the ragingbull.rom postings, it is clear that Mr. Chien did not rely on the alleged omissions by the Company. Thus, the Court concludes that both the original and amended complaints contained material falsehoods in violation of Rule 11(b)(3). *See Callaway v. Marvel Entm't Group, Div. of Cadec Indus. Corp.*, 854 F. 2d 1452, 1474 (2d Cir. 1988) (finding sanctions arc appropriate when "the papal made false statements").[3]

The next question is whether the violation should run against Mr. Chien, Mr. Votre, or both. Mr. Chien admitted that he read and approved both the original and amended complaints, so it is clear that Mr. Chien is at least partially responsible for the Rule 11(b)(3) violation. *See Callaway*, 854 F. 2d at 1474 (noting that a represented party should be sanctioned he had knowledge of false statements). Although Mr. Chien may not have understood the legal consequences of the material falsehoods, he did know that at least some dilution would occur, which directly contradicts statements about dilution in the original and amended complaints.

Whether Mr. Votre should also be sanctioned under Rule (b)(3) is a closer question. Generally, "where the client misleads his attorney and thus causes him to file frivolous papers, it is apparent that the client, not the attorney, should be sanctioned." *Eastway Construction Car. v. City of New York*, 637 E Supp. 558, 569 (E.D.N.Y. 1986), modified, 821 F.2d 121(2d Cir. 1987), *cert. denied*, 484 U.S. 918 (1987). However, "where the party does know that the filing and signing is wrongful and the attorney reasonably should knew, then sanctions against both are appropriate." Callway, 854 F.2d at 1474.

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[3] Mr. Votre points out that under Second Circuit case law, sanctions are unwarranted when the court does not give the plaintiff a chance to fill in the deficiencies in his complaint through discovery. See *Commercial Cleaning Serv., LLC v Colin Serv. Sys. Inc.*, 271 F.3d 374, 386 (2d Cir.2001). However, in this case, Mr. Chien was in possession of the relevant information and no amount of discover would have corrected the material falsehoods in the amended complaint.

An attorney "is entitled to rely on his or her client's statements as to factual claims when those statements are objectively reasonable." *Hadges v, Yankers Racing Corp.,* 48 F.3d 1320, 1329 (2d Cir. 1995). However the attorney must still engage in "an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b). Given this standard, the Court believes that Mr. Votre had no reason to doubt the factual accuracy of the original complaint at the time it was filed. According to Mr. Votre's affidavit, Mr. Chien did not inform him prior to the filing of the original complaint that he had posted to ragingbull.com concerning dilution. See Kenneth Votre Aff. in. Opp'n to Sanctions [doc. #89], ¶13. And the Court does not believe that Mr. Votre had a duty to inquire about possible postings *sua sponte* without some indication that such postings existed.

Once Defendants, filed their Request for Judicial Notice [doc. #25], however Mr. Votre had an obligation to ask his client whether the postings were his. And, in fact, Mr. Votre stand at oral statement that he asked Mr. Chien about the postings shortly after Defendants filed their Request for Judicial Notice, and that Mr. Chien admitted at that point that he had authored the postings. Yet, after Mr. Votre discovered that there were falsehoods in his original complaint, he neither caught to amend the complaint to correct the falsehoods, nor did he seek to withdraw the complaint or alternately to withdraw as Mr. Chien's counsel. Instead, Mr. Votre filed an amended complaint that contained the same falsehoods and continued to advocate for the amended complaint for eight long months before moving to withdraw as Mr. Chien's attorney.

Mr. Votre would like the Court to believe that he withdrew as soon as he discovered that the complaint contained falsehoods. He points to the fact that Defendants did not disclose the posting in which Mr. Chien discussed the complaint until April 2008, at which point he sought Mr. Chien's permission to try to settle the case. However, the additional postings discovered by Defendants in April 2008 say nothing about dilution or any of the other actual allegations in the complaint. As to the postings regarding the complaint, Mr. Chien was well within his rights to post publicly-available documents and to discuss lawsuit to which he is a party. The Court admits, as Mr. Votre argued at oral argument on the Motion for Sanctions, that commenting on an ongoing case was perhaps not the most prudent thing for Mr. Chien to do. That issue, however, is separate from whether the complaint as filed contained material falsehoods.

Instead, the additional postings merely lent further support to Defendants' contention that "andrewchien' was in fact the Plaintiff in this case, which until Mr. Chien's admission in July 2008 remained unconfirmed. Of course, it may have caused Mr. Votre added anxiety that Defendants now had almost incontrovertible proof that Mr. Chien was the author of the ragingbull.com postings. But nothing in the additional postings gave Mr. Votre any information that he did not already have in November 2007 when he first asked Mr. Chien about his postings. The Rule 11 violation occurred when Mr. Votre filed the amended complaint on Mr. Chien's behalf knowing that it contained material falsehoods, not when he learned that Defendants had proof of the violation. Besides, if Mr. Votre realized in April 2008 that the amended complaint contained material falsehoods and Mr. Chien refused to give him permission to amend the complaint the appropriate course of action was for Mr. Votre to withdraw as Mr. Chien's attorney at that point, not to wait another three months until after oral argument on the renewed Motion to Dismiss.

Mr. Votre also argues that he did not believe that Mr. Chien's postings were fatal to the case because Mr. Chien had told him that his postings about dilution were simply idle chatter and had no basis in reality. Thus, he contends that the postings were simply irrelevant to the factual allegations in the complaint. Mr. Votre continued to make this argument at the oral argument on the Motion for Sanctions, despite the fact that he bad already withdrawn as Mr. Chien's counsel. However, in his affidavit Mr. Votre states that after the oral argument on the renewed Motion to Dismiss, he "recognized Chien could not truthfully testify that he did not know the dilution." *See* Kenneth Votre Aff. in Opp'n to Sanctions [doc. #89], ¶35. Likewise, in his Supplemental Memorandum in Opposition to the Motion for Sanctions [doc. # 103], Mr. Votre states that "[h]e did not learn of certain untruths by Chien until he moved to withdraw as counsel for Chien in this action." *id.* at 8.

In short, Mr. Votre wants it both ways, arguing both that no violation of Rule 11(b) (3) occurred and that as soon as he realized that a violation occurred, he withdrew from the case. The Court does not accept that Mr. Votre had *an* epiphany at oral argument on the renewed Motion to Dismiss that caused him to suddenly disbelieve Mr. Chien's explanation of the postings. There was no new information disclosed at oral argument that had any bearing on the factual insufficiency of the amended complaint, or the untruths alleged in it, that Mr. Votre did not have in his possession as of November 2007.

To put it bluntly, the Court is not impressed that Mr. Votre waited until it was clear that the Court was going to grant the renewed Motion to Dismiss and was going to consider the ragingbull.com postings on any subsequent motion for sanctions before deciding to withdraw as Mr. Chien's counsel. The Court appreciates the fact that Mr. Votre was dealing with a difficult client and that he did take steps to remedy the situation, including asking Mr. Chien's permission to settle the case and to amend the complaint. But this was not sufficient to avoid a violation of Rule 11(b) (3). If Mr. Chien would not give Mr. Votre permission to either amend or withdraw the complaint, Mr. Votre should have moved to withdraw as Mr. Chien's counsel within a reasonable time. The Court therefore concludes that sanctions under Rule 11(b) (3) should run against both Mr. Chien and Mr. Votre for the factual insufficiency of the amended complaint.

III.

Having found a violation of Rule 11(b)(2) and (3), the Court now turns to the issue of sanctions under the PSLRA, which puts in place the presumption that the appropriate sanction is full attorney's fees and expenses if the Rule 11 violation was "substantial." *See* 15 U.S.C § 78u-4(c)(3)(A)(ii). In deciding whether a violation of 11(b) is "substantial," the Second Circuit has stated that once the court concludes that a frivolous claim has been brought in violation of Rule 11 (b)

> the court must examine whether nonfrivolous claims have been joined and, if so, whether these claims - whatever their number - are of a quality sufficient to make the suit as a whole nonabusive and the Rule 11 violation not substantial. If no weighty nonfrivolous claims are attached, the statutory presumption applies.

Gurary, 303 F. 3d at 223. The presumption of full attorney's fees and expenses may be rebutted if the court finds that the violation was *de minimis. See id.:* 15 U.S.C. §78u-78u-4(c)(3)(B)(ii). Alternatively, the presumption may he rebutted by showing that "the award of attorneys' fees and other expenses will impose an unreasonable burden on [the sanctioned] party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed." 15 U.S.C.§78u-4(c)(3)(B)(i).

The Second Circuit in *Gurary* recognized that there was tension in the statutory text between a substantial and *a de minimis* violation, observing that "de minimis must mean something different from 'not substantial.'"· *Gurary.* 303 F.3d at 223 n.3. Because the violation in Gurary was substantial, the Second Circuit did not divide what would constitute *de minimis* violation, although it did opine that *a de minimis* violation might "refer to a minor Rule 11-violative procedure flaw in a suit that, though not in itself otherwise abusive, has no saving merit" or might refer to a case in which "of, say, twenty counts, one violates

Rule 11 while nineteen does not (but are of little or no work), that a court would deem the violation substantial and yet, echoing the PSLRA's legislative history, find the violation de minimis." *Id.* Even if the Court determines that the Rule 11 violation is not substantial, or determines either that *it* was de minimis or that a full sanctions award would create an "unreasonable burden," the Court must still award partial sanctions" to punish the party that brought the frivolous claims." *Byrne v Buythisfast network. Inc.* No.03 Civ. 1999, 2005 WL 1155175, at •5 (S.D.N.Y. May 17, 2005) (citing *Gurary*. 303 F.3D at 220).

In this case, the complaint alleged only two claims - §§10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b),78t(a). As explained above, the §10(b) claim was frivolous. The §20(a) claim was premised on an underlying violation of §10(b) and hence was also frivolous. *See* Ruling and Order [doc. # 71] at 19 ("in order to state a cause of action under §20(a), a plaintiff must plead, among other things, a primary violation by a controlled person."). Because "no weighty nonfrivolous claims are attached," the violation of Rule 11(b) is substantial and the statutory presumption of full attorney's fees and costs applies. *Gurary*, 303 F.3d at 223.[6]

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[6] Nor can Mr. Votre and Mr. Chien avoid a finding of a substantial violation by claiming that there were other possible claims that they could bring if they were allowed to amend the Complaint a second time. See Gurary, 303 F. 3d at 224 ("[T]he legal strength, or lack thereof, of [a] possibly cognizable claim that was not presented in the complaint, and that was itself unlikely to succeed on the merits, cannot suffice to relieve the present complaint from being an unfounded action as a whole." (emphasis in original).

The Court further concludes that the Rule 11(b) violation was not *de minimis*. The complaint did not suffer from a minor procedural flaw. Instead, it failed to plead at least two or the five elements of a securities fraud action and contained material falsehoods that called into question a third element. And again, the complaint does not make other non-frivolous claims that might otherwise qualify the violation as *de minimis*.

However, the Court further concludes that a full award of attorney's fees would be an "unreasonable burden" on both Mr. Chien and Mr. Votre. Mr. Votre runs a small law firm that employs only four other employees besides himself. *See* Aff. of Kenneth Votre [doc. #103-2],¶11. He is the sole provider for his wife and four children, *see id*, and represented at oral argument on the Motion for Sanctions that an award of full attorney's fees and expenses in this action would constitute a significant hardship; the Court accepts that representation. Likewise, Mr. Chien at oral argument stated that he had limited ability to pay any sanctions at all. The Court does not believe that awarding partial attorney's fee would impose a greater burden on Defendants than it would on Mr. Chien and Mr. Votre. At the very least Defendants have put nothing in the record to suggest that awarding partial attorneys fees would impose a substantial burden on them.

Furthermore, the Court believes that an award of full attorney's fees in this case would be unjust. Defendants seek $121,971.35 in attorney's fees and costs. Although the Court understands the complexity of the issues presented and the amount of briefing required, the Court simply does not understand how

Defendants managed to spend $121,971.35 defending what Defendants claim- and the Court agreed - was a patently frivolous lawsuit. This is especially the case since Mr. Chien only sought $52.766.77 in damages, and the parties did not take any discovery because the motion to dismiss stayed discovery under the PSLRA. As an example of what the Court views as excessive fees, Defendants' local counsel accrued $21,890 in attorney's fees in addition to the $ 93,408.75 expended by Defendants' lead counsel. The Court does not find this a reasonable amount of fees for local counsel to have expended on this case.

Moreover, the Court believes it would be unjust to award Defendants' attorney's fees for the preparation and filing of the first Motion to Dismiss. At least in term of Rule 11(b)(3), the Court has determined that Mr. Votre did not commit a violation with respect to original complaint. And the Court did give Mr. Votre a chance to correct the legal defects by denying the Motion to Dismiss without prejudice. If Mr. Votre bad corrected the defects at that point, or had withdrawn the complaint, the Court does not believe that the parties would be where they are today.

Finally, $8.551.50 of lead counsel's fees accrued after Mr. Votre moved to withdraw as counsel an were incurred in connection with Mr. Chien's Motion to Correct/Amend, the subsequent brief on jurisdiction, and on Mr. Chien's appeal to the Second Circuit[7]. The Court does not believe that including this $8,551.50 in the sanctions award would be just. Mr. Votre surely cannot be held responsible fees that accrued after he withdrew as Mr. Chien's counsel and the Court is certain that Mr. Chien did not know what he was doing when he filed both a Motion to Amend and a Notice of Appeal, which precipitated another round of briefing on jurisdiction.

Subtracting $14,762.50 for the filing of the first Motion to Dismiss and $8,551.50 for the post July 11, 2008 fees, lead counsel's fees are left at $ 70,094.75 and $6,008.45 for expense· As explained above the Court considers even this figure far too high for what the case involved and the briefing required. It therefore cuts lead counsel's fees to $60,000 and $ 3,000 for expenses. It further cuts local counsel's fees, to $5,000 and $ 500 in expenses. Altogether, the Court is left with reasonable attorney's fees and expenses in the amount of $68,500.

In order to take into account the unreasonable burden that such an award would have on Mr. Votre and Mr. Chien, the Court further discount this amount by 50% to $34,250. The Court is comfortable that this amount adequately punishes the violation and will deter future frivolous lawsuits by both Mr. Votre and Mr. Chien. Moreover, although it does not excuse the violation itself, the Court believes it appropriate to take into account the fact that Mr. Votre did not act in bad filth and that Mr. Chien, whose facility with the English language is not great, may not have entirely understood the consequences of what he did.

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[7] The Court will not subtract the fees expended in the briefing and arguing of the Motion for Sanctions [doc. #74],which the Court believes should rightly run against Mr. Votre and Mr. Chien.

Although, it is difficult to make such determination, the Court concludes that violations of Rule11(b)(2) and (b)(3) contributed equally at the overall Rule 11(b) violation and that Mr. Votre and Mr. Chien were roughly equal in their responsibility for the Rule 11(b)(3) violation. Therefore, the Court awards a sanction in the amount of $ 17,125 for the Rule 11(b)(2) violation and in the amount of $8562.50 for the Rule 11(b)(3) violation against Mr. Votre for a total of $25,687.50. The Court awards a sanction in the amount of $8,562.50 against Mr. Chien for his part of the Rule 11(b)(3) violation. The Rule 11(b)(3) award is several and not joint. Accordingly, the Court GRANTS Defendants' Motion for Sanctions [doc. #74] insofar as it seek sanctions against Mr. Votre and Mr. Chien and DENIES Defendants' Motion insofar as they seek $121,971.35 in attorney's fees and costs.

IV.

Finally, the Court considers Mr. Chien's Motion to Reopen [doc. #104], in which he seeks to reopen the case and amend the complaint to address claims that .Mr. Chain feels that Mr. Vore failed to raise. As the Court explained to Mr. Chien in response to his previous Motion to Amend [doc. #73], the Court does not believe that it has jurisdiction over Mr. Chien's claims at this time, although the Court does retain jurisdiction to rule on the Motion for Sanctions. *See* Ruling and Order [doc. # 90] at 5. This is so because Mr. Chien filed a Notice of Appeal of the Court's Ruling and Order [doc. # 71] dated July 17, 2008, and the Court cannot exercise jurisdiction concurrently with the Second Circuit. *See* Ruling and Order [doc. #90] at 5 ("Because the Court cannot say with certainly that Mr. Chien's appeal is a "frivolous" or "plainly unauthorized," the Court does not believe it has jurisdiction to decide his Motion to Correct/Amend.").

Moreover, the Court notes that Mr. Chien has filed another law suit against Defendants that alleges many of the claims he wishes to add here and that the case has been removed from the Judicial District of New Haven to this Court. *See* Chien v. Skysar Bio, Pharmaceutical Co., 09-cv-149 [doc. #1]. Therefore, the Court DFNIES Mr. Chien's Motion to Reopen [doc. #104].

V.

In conclusion, the Court GRANTS in part and denied in part Defendants' Motion for Sanction [doc.# 74] and DENIES Mr. Chien ' s Motion to Reopen [doc. #104]. The Court sanctions Mr. Votre in the amount $25,687.50 and Mr. Chien in the amount of $ 8652.50. Mr. Votre and Mr. Chien shall pay the above amount to Defendants by April 6, 2009.

IT IS SO ORDERED

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: February 5, 2009

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1).Federal Rules of Civil Procedure ("FRCP"):

"Rule(4)(i)(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity.

To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee."

Rule 8. General Rules of Pleading

(b) Defenses; Admissions and Denials.

(1) In General.

In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it;

Rule 9. Pleading Special Matters

(b) Fraud or Mistake; Condition of Mind.

In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Rule 11. Signing Pleadings, Motions, and Other papers; Representations to the Court; Sanctions

(c) Sanctions.

(1) In General.

If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(2) Other Amendments.

In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(2) Exchange Act 1934 As Amendment:

Section 14 – Proxies

a. **Solicitation of proxies in violation of rules and regulations**

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12.

e. **Untrue statement of material fact or omission of fact with respect to tender offer**

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Rule 14a-3 -- Information to be Furnished to Security Holders

a. No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with:

3. A publicly-filed preliminary or definitive proxy statement, not in the form and manner described in Rule 240.14a-16, containing the information specified in Schedule 14A (Rule 240.14a-101), if:

i The solicitation relates to a business combination transaction as defined in Rule 230.165 of this chapter, as well as transactions for cash consideration requiring disclosure under Item 14 of Rule240.14a-101.

Rule 14a-6 -- Filing Requirements

o. Solicitations before furnishing a definitive proxy statement. Solicitations that are published, sent or given to security holders before they have been furnished a definitive proxy statement must be made in accordance with Rule 14a-12 unless there is an exemption available under Rule 14a-2.

Rule 14a-9 – False or Misleading Statements

a. No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Rule 14a-16-- Internet Availability of Proxy Materials

m. This section shall not apply to a proxy solicitation in connection with a business combination transaction, as defined in Rule 230.165 of this chapter, as well as transactions for cash consideration requiring disclosure under Item 14 of Rule 240.14a-101.

(3) Nevada Revised Status (NRS) 14.020

"NRS 14.020 Artificial persons doing business in Nevada to appoint registered agents; service of process, demand or notice; fine for failure to staff street address of registered agent.

1. Every corporation, miscellaneous organization described in chapter 81 of NRS, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust and municipal corporation created and existing under the laws of this State, any other state, territory or foreign government, or the Government of the United States, doing business in this State shall appoint and keep in this State a registered agent who resides or is located in this State, upon whom all legal process and any demand or notice authorized by law to be served upon it may be served in the manner provided in subsection 2. A statement of change of registered agent must be filed in the manner provided in NRS 77.340 if the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation desires to change its registered agent. A registered agent must file a statement of change in the manner provided in NRS 77.350 or 77.360 if the registered agent changes its name or address.

2. All legal process and any demand or notice authorized by law to be served upon the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation may be served upon the registered agent personally or by leaving a true copy thereof with a person of suitable age and discretion at the most recent street address of the registered agent shown on the information filed with the Secretary of State pursuant to chapter 77 of NRS."

(4) General Statues of Connecticut: Section 52-59b

Section 52-59b. Jurisdiction of courts over nonresident individuals, foreign partnerships and foreign voluntary associations. Service of process.

"(c) Any nonresident individual, foreign partnership or foreign voluntary association, or the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, over whom a court may exercise personal jurisdiction, as provided in subsection (a) of this section, shall be deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual, foreign partnership or foreign voluntary association, or the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual, foreign partnership or foreign voluntary association personally. The process shall be served by the officer to whom the same is directed upon the Secretary of the State by leaving with or at the office of the Secretary of the State, at least twelve days before the return day of such process, a true and attested copy thereof, and by sending to the defendant at the defendant's last-known address, by registered or certified mail, postage prepaid, return receipt requested, a like true and attested copy with an endorsement thereon of the service upon the Secretary of the State. The officer serving such process upon the Secretary of the State shall leave with the Secretary of the State, at the time of service, a fee of twenty-five dollars, which fee shall be taxed in favor of the plaintiff in the plaintiff's costs if the plaintiff prevails in any such action. The Secretary of the State shall keep a record of each such process and the day and hour of service."